Supreme Court, U.S.
FILED

091105 JAN 19 2010

OFFICE OF THE CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

AIG BAKER STERLING HEIGHTS, L.L.C.,
A.B. OLATHE II LIMITED PARTNERSHIP,

Petitioners,

v.

AMERICAN MULTI-CINEMA, INC.

Respondent

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

JAMES A. HARRIS, JR.
Counsel of Record
CLYDE O. "TRES" WESTBROOK, III
HARRIS & HARRIS, LLP
2501 20th Place South
Suite 450
Birmingham, AL 35223
(205) 871-5777

March 5, 2010

QUESTION PRESENTED

Does the FAA preclude a federal court from using Rule 60(b) to review the merits of an arbitration award after entering judgment confirming the award when no basis for disturbing the award exists under §§ 10 or 11 of the FAA?

TABLE OF CONTENTS

QUESTION PRESENTED..... i

TABLE OF AUTHORITIES..... vi

OPINIONS BELOW..... 1

STATEMENT OF BASIS OF JURISDICTION..... 1

STATUTES INVOLVED..... 1

STATEMENT OF THE CASE..... 2

I. INTRODUCTION..... 2

II. BACKGROUND..... 5

A. Baker Obtains an Arbitration Award..... 5

B. The District Court Unsuccessfully Attempts to Modify the Arbitration Award Under § 11 of the FAA..... 6

C. The District Court Goes Outside The FAA to Modify the Award..... 8

III. THE ELEVENTH CIRCUIT SANCTIONS THE IMPROPER USE OF RULE 60(B) TO REVIEW THE MERITS OF ARBITRATION AWARDS..... 13

REASONS FOR GRANTING THE WRIT..... 16

I. INTRODUCTION..... 16

II. THE ELEVENTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S DECISION IN *HALL STREET*..... 18

III. THE ELEVENTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF OTHER UNITED STATES COURTS OF APPEALS REGARDING THE USE OF RULE 60(B) TO REVIEW THE MERITS OF ARBITRATION AWARDS..... 22

IV. THIS CASE RAISES THE IMPORTANT QUESTION OF WHETHER RULE 60(b) IS AVAILABLE TO REVIEW THE MERITS OF ARBITRATION AWARDS UNDER THE FAA..... 26

A. Introduction..... 26

B. Rule 60(b) Does Not Provide A Means to Avoid the FAA's Narrow Scope of Review..... 28

C. Rule 60(b) Does Not Allow Courts to Re-Open Issues Fully and Finally Decided in Arbitration..... 30

D. Rule 60(b) May Not Be Used to Provide Relief That Is Not Available In Confirmation Proceedings..... 31

V. CONCLUSION..... 32

APPENDIX

1. Opinion of the Eleventh Circuit, dated August 18, 2009..... 1a

2. Memorandum Opinion of the District Court, dated July 17, 2008..... 27a

3. Opinion of the Eleventh Circuit, dated November 28, 2007..... 48a

4. Order of the District Court, dated December 7, 2006..... 64a

5. Order of the District Court, dated April 15, 2008..... 71a

6. Order of the Eleventh Circuit on Petition for Rehearing, dated October 22, 2009..... 73a

7. 9 U.S.C. § 9..... 75a

8. 9 U.S.C. § 10..... 77a

9. 9 U.S.C. § 11..... 79a

10. 9 U.S.C. § 13..... 80a

11. Fed. R. Civ. P 60(b),..... 82a

TABLE OF AUTHORITIES

CASES:

AIG Baker Sterling Heights, L.L.C. v. American Multi-Cinema, Inc., 508 F.3d 995 (11th Cir. 2007)..... *passim*

AIG Baker Sterling Heights, L.L.C. v. American Multi-Cinema, Inc., 579 F.3d 1268 (11th Cir. 2009)..... *passim*

Bear Valley Mut. Water Co. v. R.A. Riddell, 493 F.2d 948 (9th Cir. 1974)..... 31

Bonar v. Dean Witter Reynolds, Inc., 835 F.2d 1378 (11th Cir. 1988)..... 31

e.spire Commc'ns Inc. v. CNS Commc'ns, Ltd., 39 Fed. Appx. 905 (4th Cir. 2002).... 23,24,25

Hall Street Assoc.s, L.L.C. v. Mattel, Inc., 552 U.S. 576, 128 S. Ct. 1396 (2008)..... *passim*

Lafarge Conseils et Etudes, S.A. v. Kaiser Cement & Gypsum Corp., 791 F.2d 1334 (9th Cir. 1986)..... 24,25, 30,32

Major League Baseball Players Ass'n v. Garvey, 532 U.S. 504, 121 S. Ct. 1724 (2001)..... 19,30

O.R. Scc. Inc. v. Professional Planning Assoc.s, Inc. 857 F.2d 742 (11th Cir. 1988)..... 30

Pitchess v. Davis, 421 U.S. 482, 95 S. Ct. 1748 (1975)..... 16,21

Raiford v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 903 F.2d 1410 (11th Cir. 1990)..... 29

Washington-Baltimore Newspaper Guild, Local 35 v. Washington Post Co., 442 F.2d 1234 (D.C. Cir. 1971)..... 23,25

STATUTES:

9 USC § 1..... 1

9 USC § 9..... 19,20, 29

9 USC § 10..... *passim*

9 USC § 11..... *passim*

9 USC § 13..... 3,13, 21,27,29

28 U.S.C. § 1254..... 1

28 U.S.C. § 1332..... 6

COURT RULES:

Fed. R. Civ. P. 1	29
Fed. R. Civ. P. 60(b)	*passim*
Fed R. Civ. P. 81	13,15, 24,29

OPINIONS BELOW

The decision of the United States Court of Appeals for the Eleventh Circuit ("Eleventh Circuit"), dated August 18, 2009, is reported at 579 F.3d 1268 and is reproduced in the Appendix to the Petition ("App.") at la-26a. The order of the United States District Court for the Northern District of Alabama ("District Court"), dated May 1, 2008, is published as an appendix to the Eleventh Circuit's opinion, 579 F.3d at 1274, and is reproduced at App. 14a-15a. The order of the District Court on Respondent's Rule 60(b) motion, dated July 17, 2008, is published as an appendix to the Eleventh Circuit's opinion, 579 F.3d at 1274-75, and is reproduced at App. 16a-18a.

In prior proceedings in this matter, the opinion of the Eleventh Circuit, dated November 28, 2007, is reported at 508 F.3d 995, and is reproduced at App. 48a-63a.

STATEMENT OF BASIS OF JURISDICTION

The Eleventh Circuit entered its opinion on August 18, 2009. The Eleventh Circuit entered its order denying Petitioners' petition for rehearing *en banc* on October 22, 2009. (App. 73a - 74a). This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves provisions of the Federal Arbitration Act, 9 U.S.C. §§ 1, *et seq.* ("FAA") and

Rule 60 of the Federal Rules of Civil Procedure ("Rule 60"). The pertinent provisions of the FAA and Rule 60 are reproduced in the appendix at App. 75a-82a.

STATEMENT OF THE CASE

I. INTRODUCTION

This case involves an expansion of the established scope of federal court review of arbitration awards. Final resolution of this case will determine whether Rule 60(b) is available to replace the narrow scope of review imposed by the FAA and the decisions of this Court. The Eleventh Circuit's decision sanctions the use of the broad grounds of Rule 60(b) to review the merits of an arbitration award once it has been reduced to a judgment. Such a result represents a dramatic expansion of the scope of review of arbitration awards under the FAA. The Eleventh Circuit's decision disregards this Court's holding in *Hall Street Assoc.s, L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 128 S. Ct. 1396 (2008) ("*Hall Street*"), that "§§ 10 and 11 respectively provide the FAA's exclusive grounds for expedited vacatur and modification" of arbitration awards. *Hall Street*, 128 S. Ct. at 1403.[1]

---

[1] It is undisputed that this case involves a proceeding under the FAA: Petitioners sought to confirm the award under the FAA; Respondent sought to modify the award under the FAA; and both the District Court and the Eleventh Circuit (in two separate appeals) treated this case as an FAA case.

Originally, the District Court reviewed the merits of the arbitration award and determined that the arbitration award was manifestly unjust and provided a windfall to Petitioners.[2] The District Court then set out to find some law to support its conclusion that a judgment should not be based on the award. First, the District Court misconstrued the plain language of § 11 of the FAA. The Eleventh Circuit promptly reversed, finding no grounds for modification under § 11. *AIG Baker Sterling Heights, L.L.C. v. American Multi-Cinema, Inc.*, 508 F.3d 995 (11th Cir. 2007) ("*Baker I*"). On remand, the District Court found that Rule 60(b) provided a basis for reducing the judgment to avoid "manifest injustice." (App. 41a). In doing so, the District Court relied on precisely the same evidence on which it had previously relied in entering the first erroneous judgment.

A divided panel of the Eleventh Circuit affirmed the District Court's decision. The Eleventh Circuit relied on § 13 of the FAA in finding that once a judgment has been entered on an arbitration award, it is "to be treated no better or worse than any other civil judgment." *AIG Baker Sterling Heights, L.L.C. v. American Multi-Cinema, Inc.*, 579 F.3d 1268, 1273 (11th Cir. 2009) ("*Baker II*"). The majority concluded that Rule 60(b) may be used to modify a judgment confirming an arbitration award even though the award could not have been modified under the FAA.

---

[2] To avoid the limitations contained in §§ 10 and 11 of the FAA, the District Court delayed entry of a final judgment for three and a half (3½) years, thus thwarting this Court's promise of expedited confirmation in federal courts.

Thus, a judgment based on an arbitration award could be modified for any reason authorized by Rule 60(b). Rule 60(b) authorizes relief from judgment for each and every reason known to the common law! If the Eleventh Circuit's decision is not reversed, the limitations imposed by §§ 10 and 11 are gone.

The Eleventh Circuit's decision conflicts with this Court's numerous decisions mandating exceedingly narrow and deferential judicial review of arbitration awards, and with other federal appeals courts decisions prohibiting the use of Rule 60(b) to revisit the merits of an underlying arbitration award following confirmation. The Eleventh Circuit held, in effect, that this Court's repeated admonitions that federal courts should not examine the merits of arbitration awards are meaningless once a judgment is entered on an arbitration award. Under the Eleventh Circuit's holding, the FAA restricts court involvement in the merits of an arbitration proceeding only until that magic moment when the award becomes a judgment. Thereafter the judgment can be modified for any of the reasons set forth in Rule 60(b).[3] Rule 60(b) certainly has a role with regard to judgments based on arbitration awards.[4]

---

[3] In addition to the specific grounds for relief contained in Rule 60(b)(1)-(5), this would include "any other reason that justifies relief." Fed. R. Civ. P. 60(b)(6).

[4] It is critical to distinguish between the use of Rule 60(b) to grant relief from a judgment entered on an arbitration award where such relief affects matters that are properly within the scope of the court's authority during confirmation (or vacation or modification) proceedings and the use of Rule 60(b) to grant relief from such a judgment where such relief affects matters

However, that role is not to eviscerate §§ 10 or 11 of the FAA. Judge Kravitch, writing in dissent, recognized that the majority was using Rule 60(b) for an "end run around the FAA." *Baker II*, 579 F.3d at 1276.

II. BACKGROUND

A. Baker Obtains an Arbitration Award

In 2002, Petitioners AIG Baker Sterling Heights, L.L.C. and A.B. Olathe II Limited Partnership (collectively "Baker") and Respondent American Multi-Cinema, Inc. ("AMC") agreed to arbitrate a dispute relating to AMC's liability to Baker for a portion of property taxes incurred over several years at certain shopping centers. AMC and Baker agreed to allow the arbitrators to fully and finally decide: (1) the total amount AMC was obligated to pay to Baker for real estate taxes; (2) the amount AMC previously had paid to Baker for real estate taxes; and (3) the amount AMC still owed to Baker for real estate taxes. The parties agreed that the arbitrators' "decision shall be final and binding upon the parties . . ." (Doc. 1, pp. 4-8).[5]

In April, 2003, the arbitrators conducted a hearing during which AMC and Baker submitted

---

that were within the scope of the underlying arbitration proceedings. In this case, the Eleventh Circuit ratified the District Court's decision that affected the merits of the arbitration proceedings.

[5] All citations to documents in the record are to documents contained in the record on appeal before the Eleventh Circuit.

evidence and stipulations regarding amounts AMC had paid and amounts AMC still owed Baker. With respect to one of the shopping centers, AMC and Baker stipulated that AMC had paid $0.00 for 2002 and, if a certain formula was used to determine AMC's liability, would owe Baker approximately $226,771.00. The arbitrators awarded Baker a total of $866,425.18 for all years and all shopping centers involved. (App. 51a).

B. The District Court Unsuccessfully Attempts to Modify the Arbitration Award Under § 11 of the FAA

Subsequent to the arbitration award, AMC claimed that the award was incorrect. AMC alleged that it had made a mistake in connection with the stipulation and had negligently failed to offer evidence in its exclusive possession with regard to payment of 2002 taxes. AMC claimed to have made a tax payment directly to the local taxing authority in December 2002, several months before the arbitration hearing. (*See* App. 51a-52a). Baker moved to confirm the award in federal court in Alabama and AMC applied for modification of the award in federal court in Missouri. Federal jurisdiction was based on 28 U.S.C. § 1332, because complete diversity of citizenship existed between the parties and the amount in controversy exceeded $75,000 exclusive of interest and costs.[6] AMC

---

[6] AMC is a Missouri corporation with its principal place of business in Missouri. All of Baker's members and partners are citizens of states other than Missouri.

sought modification of the award under § 11 of the FAA, which permits modification of an arbitration award based on an "evident material mistake in the description of any person, thing or property referred to in the award." 9 U.S.C. § 11(a). The Missouri case subsequently was transferred to the Alabama federal court and consolidated with the Alabama case. *Baker I,* 508 F.3d at 998. To support its application for a reduced judgment, AMC submitted affidavits to the District Court, which it claimed showed that it had made the tax payment directly to the local taxing authority in 2002, several months before the arbitration hearing, but neglected to tell anyone about the payment. *Id.*[7]

Roughly three and a half (3½) years after this action was commenced, the District Court entered a final judgment for less than the arbitration award. The judgment was reduced by the amount AMC claimed it paid to the local taxing authority. The District Court based its decision on its determination that AMC's negligent failure to provide the arbitrators with evidence of the alleged payment resulted in an "evident material mistake" in the arbitration proceedings that justified modification of the award pursuant § 11 of the FAA. (*See* App. 68a). Of course, the District Court could only reach such a conclusion by reviewing the merits of the arbitration award and the evidentiary basis

---

[7] To the extent that the evidence could have been used at the arbitration proceedings to reduce AMC's liability to Baker, it was inconsistent with the stipulation on which the arbitrators relied in determining the amount of the award.

for the arbitrators' decision. The District Court also "exercise[d] its discretion" to refuse to award Baker pre-judgment interest on any portion of the award. (App. 69a-70a). The District Court's decision merely reflected a value judgment that it was more important that the award be "correct" than that the decision of the arbitrators be honored and AMC be required to suffer the consequences of its admitted gross negligence.

The Eleventh Circuit reversed the judgment of the District Court as to both the amount of the judgment and Baker's entitlement to pre-judgment interest. The Eleventh Circuit held that the District Court erred by modifying the arbitration award because AMC's negligent presentation of facts was not an "evident material mistake in the description of any person, thing or property referred to in the award" under § 11 of the FAA. *Baker I,* 508 F.3d at 999.

C. The District Court Goes Outside the FAA to Modify the Award

Following reversal and remand, the District Court held a status conference at AMC's request. During the conference, the District Court stated that, despite the Eleventh Circuit's reversal, it still wanted to find a way to enter a judgment for less than the award and give AMC credit for its alleged payment to the taxing authority. *Baker II,* 579 F.3d at 1270. The District Court encouraged the parties to submit briefs to aid it in giving AMC credit for the

alleged payment to the to the taxing authority in 2002:

> [W]hile I think that it's appropriate to look at the court's authority under 60(b)(5), I also wonder whether there is any non-statutory grounds for either modifying the award that we didn't consider previously or entering a judgment with a credit that we haven't considered, possibly a public policy ground or whatever.
>
> . . . I would like for us to look at that and explore that as well as part of a briefing schedule.

(Tr., pp. 3-4).[8]

Following this Court's decision in *Hall Street*, the District Court invited briefing "on the existence of any non-FAA grounds for modifying the arbitration award, such as whether the arbitration award is 'contrary to public policy.'" (App. 71a-72a).[9] Baker responded by requesting that the District

---

[8] The transcript of the status conference was before the Eleventh Circuit on appeal. The District Court continued its quest to find some law to support its conclusion -- a reversal of the proper process.

[9] The District Court took *dicta* contained in *Hall Street* out of context to conclude that this Court authorized "more searching review [of arbitration awards] based on authority outside the statute." (App. 71a).

Court withdraw its order and enter a judgment consistent with the Eleventh Circuit's mandate. AMC responded by requesting that the District Court enter final judgment on the arbitration award and then use Rule 60(b)(5) to grant AMC relief from judgment.[10] The District Court agreed to follow AMC's plan. It entered judgment for the full amount of the award (less actual payments), then entertained AMC's motion to reduce the judgment by the amount of the 2002 tax payment. *See Baker II*, 579 F.3d at 1270.

AMC argued that its alleged tax payment to the taxing authority in 2002 constituted partial satisfaction of the judgment entered in 2008. Baker opposed AMC's motion, arguing that AMC should not be permitted to collaterally attack the arbitration award using Rule 60(b)(5) for several reasons: (1) Rule 60(b)(5) is inapplicable to arbitration awards; (2) Rule 60(b) does not override the restrictive scope of review contained in the FAA; (3) Rule 60(b) may not be used to relitigate issues previously decided in arbitration proceedings; (4) Rule 60(b) may not be used to grant relief that a party was not entitled to in the confirmation proceedings; (5) Rule 60(b) may not be used to circumvent the Eleventh Circuit's mandate; and (6) the law of the case doctrine precluded the District Court from re-opening the merits of the arbitration.

---

[10] Rule 60(b)(5) permits a court to grant relief from a final judgment if "the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable." Fed. R. Civ. P. 60(b)(5).

In addition, Baker argued that AMC had not satisfied the judgment six years before the judgment was entered. (*See* App. 33a).

The District Court rejected all of Baker's arguments and granted AMC's motion. On July 18, 2008, the District Court granted AMC partial relief from the judgment in the amount of $326,197.52 (representing $226,771.76 in taxes paid to the taxing authority plus $99,425.76 in pre-judgment interest) and entered an amended final order and a memorandum opinion supporting the order. (App. 16a-18a, 27a-47a).[11] The District Court claimed that its granting of relief did not implicate the merits of the arbitration award, that the Eleventh Circuit's mandate did not prohibit granting AMC relief from judgment, that AMC had partially satisfied the judgment and that granting relief would prevent "manifest injustice." (*See* App. 27a-47a).

The District Court's claim that it was acting on its own judgment and not reviewing the merits of the arbitration proceedings was sophistry. How could the District Court conclude that the arbitration award was "manifestly unjust" without reviewing the merits of the award? In fact, the District Court planted itself squarely in the middle of the matters decided by the arbitrators, just as it

---

[11] The District Court relied on former Fifth Circuit and Eleventh Circuit precedent that permits a federal court to apply payments made prior to entry of a judgment in satisfaction of that judgment. However, none of the authority on which the District Court relied involved a judgment entered on an arbitration award.

did the first time around with exactly the same evidence. The sole reason that the parties agreed to arbitrate their dispute was to have arbitrators, not a court, fully and finally determine the amount that AMC owed Baker for taxes, and that is precisely what the arbitrators did. Despite the District Court's semantics, a fundamental fact cannot be ignored: the District Court could not have granted AMC relief from the judgment without impermissibly reviewing the merits of the arbitration award. The District Court simply considered alleged evidence that could have and should have been presented to the arbitrators, then determined the amount it thought AMC should pay Baker.[12] In other words, the District Court substituted its judgment regarding how much AMC owed Baker for the decision of the arbitrators on the same issue. The District Court could not have reached its decision without reviewing the merits of the arbitration proceedings to determine whether the arbitrators gave AMC credit for the alleged payment in the award, or whether the award was "manifestly unjust" or represented a "windfall" to Baker. The District Court used Rule 60(b) to review the merits of the arbitration award outside the exclusive grounds provided in §§ 10 and 11 of the FAA, and was clumsily disingenuous as to why it did so.

Baker again appealed to the Eleventh Circuit.

---

[12] The District Court reviewed the merits of the arbitration award based on affidavits. The arbitration proceedings were not transcribed.

III. THE ELEVENTH CIRCUIT SANCTIONS THE IMPROPER USE OF RULE 60(B) TO REVIEW THE MERITS OF ARBITRATION AWARDS

On August 18, 2009, a divided panel of the Eleventh Circuit affirmed the District Court's decision. Although the majority recognized that this Court has held that "sections 10 and 11 of the FAA offer the exclusive grounds for expedited vacatur or modification of an award," they nonetheless determined that these FAA provisions were not controlling. *Baker II*, 579 F.3d at 1271-72. Instead, the majority relied on § 13 of the FAA to find that once an arbitration award has been reduced to a judgment, it "*is subject to all the provisions of law relating to those judgments.*" *Id.* at 1272 (italics in original). In other words, § 13 of the FAA was intended to override the limitations imposed by §§ 10 and 11 of the FAA! The majority explained that because Rule 60(b) is a provision of law, it could be applied to judgments confirming arbitration awards. *Id.* However, to avoid the restrictions Rule 81(a)(6)(B) places on the use of Rule 60(b), the Eleventh Circuit mischaracterized this matter as being "about partial payment of a judgment debt," not modification of an arbitration award. *Id.*, fn.4.[13] Incredibly, the Eleventh Circuit concluded that a 2002 payment to a third party before the arbitration occurred was partial payment of a judgment entered

---

[13] Rule 81(a)(6)(B) provides that the Federal Rules of Civil Procedure apply to proceedings under the FAA "only to the extent that matters of procedure are not provided" for in the FAA.

on the award in 2008! If Baker had recovered only $100,000 in the arbitration award, could the federal court have entered a judgment against Baker for the difference between the tax payment and the award?

The majority's opinion reflects the fallacy in its conclusion. The majority held that the judgment had been partially satisfied because the evidence showed that AMC had paid the taxes "directly to the taxing authority and thereby satisfied some of the judgment." *Id.* at 1273. However, the District Court's judgment did not involve a determination of how much AMC owed Baker for taxes -- that was the central question that the arbitrators decided. The District Court proceedings were limited to determining whether the arbitration award should be confirmed or modified under the FAA. The arbitrators were the final authority for determining the amount AMC owed Baker for taxes. The District Court's role after entering judgment was limited to determining whether the amount had been paid. The Eleventh Circuit's decision used semantics to elevate form over substance -- the exceedingly narrow review afforded arbitration awards under §§ 10 and 11 of the FAA can be avoided merely by changing the label on an arbitration award to "judgment," at which time the award may be vacated or modified for any of the reasons set out in Rule 60(b). Rule 60(b) offers relief from judgment based on every ground known to the common law. Use of Rule 60(b) to review judgments based on arbitration awards destroys the limitations imposed by the FAA and makes arbitration merely trial number one in an upcoming series.

Similarly, the Eleventh Circuit stated that the District Court merely acted on its own judgment without affecting the merits of the arbitration proceedings. Incredibly, the Eleventh Circuit claimed that the District Court did not "revisit the merits of a matter decided at arbitration." *Baker II*, 579 F.3d at 1271, fn.3. However, the District Court could not have determined whether taxes had been paid, whether the arbitrators considered the evidence AMC offered to show payment of taxes, whether the arbitration award represented a windfall or whether it was manifestly unjust without going directly into the merits of the arbitration award. The Eleventh Circuit not only ignored the substance of the District Court's actions but condoned them. This elevation of form over substance threatens the very purpose of the FAA.[14]

The dissenting opinion recognized that the majority was merely allowing the District Court to use Rule 60(b) "to avoid the strict limitations on judicial review set forth in the FAA." *Baker II*, 579 F.3d at 1276 (Kravitch, J., concurring in part and dissenting in part).[15] The dissent noted that Rule 81(a)(6)(B) restricts the application of the Federal

---

[14] The District Court and the Eleventh Circuit stumbled over logic and the law to reach a "fair" conclusion which undermines the entire purpose of arbitration to provide an alternative to litigation.

[15] Judge Kravitch concurred in the majority's holding that the District Court's actions did not violate the Eleventh Circuit's mandate in *Baker I*.

Rules of Civil Procedure in proceedings under the FAA. Therefore, Rule 60(b) may not "be read to provide alternative ways to modify arbitration awards" and "should not be used to circumvent other requirements of the law." *Id.* (citing *Pitchess v. Davis*, 421 U.S. 482, 489-90, 95 S. Ct. 1748, 1753 (1975)). The dissent argued for reversal of the District Court's decision because "Rule 60(b) may not be lawfully applied to modify an arbitration award." *Baker II*, 579 F.3d at 1277.[16]

Baker petitioned for rehearing *en banc*, which the Eleventh Circuit denied on October 22, 2009. (App. 73a-74a).

REASONS FOR GRANTING THE WRIT

I. INTRODUCTION

This case presents an important question of federal law that has not been but should be settled by this Court: Does the FAA preclude a federal court from using Rule 60(b) to review the merits of an arbitration award when no basis for disturbing the award exists under §§ 10 or 11 of the FAA? The answer to that question is of paramount importance in guiding and instructing federal courts regarding

---

[16] The dissent also recognized that AMC was not entitled to relief because "Rule 60(b) cannot be used to provide post-judgment relief to which that party would not have been entitled in the original judgment" and because the cases the majority relied on to allow evidence of pre-judgment payments to show satisfaction of a judgment were inapplicable because they did not involve arbitration awards. *Baker II*, 579 F.3d at 1277-78.

the scope of judicial review in court proceedings involving arbitration awards under the FAA. If Rule 60(b) is available as a basis for reviewing arbitration awards separate and apart from the FAA, then any of the grounds contained in Rule 60(b), including "any other reason that justifies relief," is available to federal courts in proceedings involving arbitration awards.

The Eleventh Circuit allowed the District Court to use Rule 60(b) to review the merits of an arbitration award under the guise of granting relief from the judgment. It did so in the face of this Court's decisions which seem to sharply circumscribe the federal judiciary's role in reviewing arbitration awards. According to the Eleventh Circuit, semantics make all the difference - - once an "arbitration award" has been recaptioned a "judgment," the FAA places no limitation on federal court authority to review the merits of the award/judgment. Such a conclusion not only undermines this Court's decisions regarding review of arbitration awards, but also threatens arbitration's primary purpose - - to provide a fast, efficient and cost effective alternative to litigation.

The Court should grant the petition for each of three reasons:

First, the Eleventh Circuit's approach to federal court review of arbitration awards conflicts with the explicit rule set forth in *Hall Street* and with this Court's other decisions that mandate narrow review of arbitration awards. These

decisions would be rendered virtually meaningless if a court could avoid narrow review merely by re-labeling an arbitration award a judgment.

Second, the Eleventh Circuit's decision conflicts with three other United States courts of appeals decisions that Rule 60(b) may not be used to review the merits of arbitration awards. Whether captioned an "award" or a "judgment," merits-based review of arbitration awards is not permitted. No other circuit has sanctioned the use of Rule 60(b) as a means for reviewing the merits of an arbitration award under the FAA.

Third, the question presented is important and is likely to recur if such an expansion of the scope of federal court review of arbitration awards is allowed to stand. Permitting relief from a judgment confirming an arbitration award for "any ... reason that justifies relief" without regard for §§ 10 or 11 of the FAA would undermine the very purpose of the arbitration process. Review of arbitration awards would no longer be expedited and in many instances arbitration would merely become a prelude to litigation.

II. THE ELEVENTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S DECISION IN *HALL STREET*

This Court has repeatedly held that federal courts are to refrain from merits-based review of decisions reached in arbitration proceedings. When reviewing arbitration awards, federal courts "have

no business weighing the merits of the grievance or considering whether there is equity in a particular claim." *Major League Baseball Players Ass'n. v. Garvey*, 532 U.S. 504, 509, 121 S. Ct. 1724, 1728 (2001). With respect to proceedings under the FAA, this Court has severely circumscribed the scope of federal court review of arbitration awards. Accordingly, review under the FAA is among the narrowest known to the law. *See Baker I,* 508 F.3d at 1001. This Court forcefully restated this theme in *Hall Street*, with the explicit holding that "§§ 10 and 11 respectively provide the FAA's *exclusive* grounds for expedited vacatur and modification" of arbitration awards. *Hall Street,* 128 S. Ct. at 1403 (emphasis added).

The Eleventh Circuit's decision in the instant case undermines *Hall Street* by dramatically expanding the scope of judicial review to include Rule 60(b) as a means of modifying or vacating decisions reached by arbitrators. In spite of this court's explicit admonition that only the grounds specified in §§ 10 and 11 can support vacation or modification of arbitration awards under the FAA, the Eleventh Circuit approved the District Court's sophistry and procedural maneuverings to review the arbitration award outside of §§ 10 and 11. In doing so, the Eleventh Circuit *de facto* recognized an additional basis for judicial review of arbitration awards under the FAA - - Rule 60(b).

Once an arbitration award is rendered, § 9 of the FAA compels a court to confirm the award "unless it is vacated, modified, or corrected 'as

prescribed' in §§ 10 and 11." *Hall Street*, 128 S. Ct. at 1402. In *Hall Street*, this Court ruled, "expanding the detailed categories [of §§ 10 and 11] would rub too much against the grain of the § 9 language, where provision for judicial confirmation carries no hint of flexibility." *Id.* at 1405. Further, "[t]here is nothing malleable about 'must grant,' which unequivocally tells courts to grant confirmation in all cases, except when one of the 'prescribed' exceptions applies." *Id.* Such a construction of the statutory language is consistent with

> a national policy favoring arbitration with just the limited review needed to maintain arbitration's essential virtue of resolving disputes straightaway. Any other reading opens the door to the full-bore legal and evidentiary appeals that can 'render informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process, ... and bring arbitration theory to grief in post-arbitration process."

Id. (citations omitted).

In the instant case, the Eleventh Circuit accomplished exactly what this Court cautioned against in *Hall Street*. *Hall Street* did not involve Rule 60(b). However, the Court's holding that §§ 10 and 11 are "exclusive" forecloses any alternative grounds for reviewing arbitration awards under the FAA.

The Eleventh Circuit justified its decision by claiming that § 13 of the FAA allows a court to modify a judgment entered on an arbitration award. Section 13 subjects judgments entered on arbitration awards to "all provisions of law." 9 U.S.C. § 13. However, §§ 10 and 11 are the exclusive "provisions of law" under which a court may review arbitration awards under the FAA. Accordingly, § 13 does not supplement or supplant §§ 10 or 11, and cannot be interpreted to allow review of an arbitration award inconsistent with §§ 10 or 11. Statutory construction requires that the various sections be harmonized, not read to conflict.

It is undisputed that in the instant case no basis exists under the FAA for modifying the arbitration award. However, the District Court used Rule 60(b) "as an end run around the FAA after §§ 10 and 11 were found to be inapplicable." *Baker II*, 579 F.3d at 1276 (Kravitch, J. concurring in part and dissenting in part). After the Eleventh Circuit rebuffed the District Court's first attempt to modify the award, it "relied on Rule 60(b) to do exactly what it had been told was impossible under the FAA." *Id.* The District Court's "end run around the FAA" is not only in direct conflict with *Hall Street*, it also conflicts with this Court's determination that Rule 60(b) may not be used to "alter the statutory command" of federal law. *Pitchess v. Davis*, 421 U.S. at 489, 95 S. Ct. at 1753 (1975).

Despite semantics, the District Court's decision to grant relief from the judgment affected the merits of questions decided by the arbitrators.

The District Court could not even determine whether the arbitrators gave AMC credit for the alleged payment without examining the basis for the arbitrators' decision and re-examining the evidence the arbitrators considered. If a court could so easily avoid the requirements of the FAA, then *Hall Street's* holding that §§ 10 and 11 provide the "exclusive" grounds for reviewing arbitration awards is meaningless. If allowed to stand, the Eleventh Circuit's decision promises to "bring arbitration theory to grief in post-arbitration process." *Hall Street*, 128 S. Ct. at 1405.

III. THE ELEVENTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF OTHER UNITED STATES COURTS OF APPEALS REGARDING THE USE OF RULE 60(b) TO REVIEW THE MERITS OF ARBITRATION AWARDS

This case presents the Court with a conflict between the Eleventh Circuit and three other United States courts of appeal that have refused to allow the use of Rule 60(b) to review the merits of arbitration awards. In fact, no other United States court of appeals has approved the use of Rule 60(b) as a basis for reviewing the merits of an arbitration award under the FAA, either before or after a judgment has been entered on the award. The Fourth, Ninth and D.C. Circuits have squarely addressed the issue. Each of them has flatly rejected such an approach.

In *Washington-Baltimore Newspaper Guild, Local 35 v. Washington Post Co.*, 442 F.2d 1234 (D.C. Cir. 1971) ("*Washington-Baltimore Newspaper Guild*"), the D.C. Circuit held that Rule 60(b) was not intended to apply to arbitration awards. The underlying arbitration involved a labor dispute. The arbitrators rendered an award adverse to the local union and the trial court entered a judgment on the award. The union sought to have the judgment vacated based on "newly available evidence" and the matter remanded to the arbitrators. *Washington-Baltimore Newspaper Guild,* 442 F.2d at 1236-38. Both the district court and the D.C. Circuit rejected the union's attempt to obtain a "rematch" before the arbitrators because it would "not only ... give the Guild more than the benefit of its bargain, but would undercut the finality and therefore the entire usefulness of arbitration as an expeditious and generally fair method of settling disputes." *Id.* at 1238. The court further noted that arbitrators "are not and never were intended to be amenable to the 'remand' of a case for 'retrial' in the same way as a trial judge." *Id.* at 1238. The court did not even consider the merits of the employee's position. Instead, the court concluded "that neither Rule 60(b) nor any judicially constructed parallel thereto was meant to be applied to final arbitration awards..." *Id.* at 1239.

The Fourth Circuit, in *e.spire Commc'ns, Inc. v. CNS Commc'ns, Ltd.*, 39 Fed. Appx. 905 (4th Cir. 2002) ("*e.spire Commc'ns*"), held that Rule 60(b)(1) may not be used to review the merits of an arbitration award. Following entry of a judgment confirming an arbitration award, the trial court

denied a Rule 60(b)(1) motion for relief from the judgment based on "excusable neglect." After finding that the trial court had no basis under the FAA to vacate the award, the Fourth Circuit found no legal or factual basis for Rule 60(b) relief. Citing Rule 81 of the Federal Rules of Civil Procedure, the Fourth Circuit noted that the "Federal Rules of Civil Procedure apply in proceedings to confirm an arbitration award 'only to the extent that matters of procedure are not provided for in [the FAA].'" *e.spire Commc'ns, Inc.*, 39 Fed. Appx. at 912 (citations omitted). In other words, "the Federal Rules fill in only those procedural gaps left open by the FAA." *Id.* Recognizing that the FAA provides the exclusive grounds for vacating an arbitration award, the court held that Rule 60(b) was inapplicable to the judgment confirming the arbitration award.

The Ninth Circuit has also held that Rule 60(b) does not provide grounds for attacking an arbitration award following confirmation. In *Lafarge Conseils et Etudes, S.A. v. Kaiser Cement & Gypsum Corp.*, 791 F.2d 1334 (9th Cir. 1986) ("*Lafarge*"), the court held that a party "may not ... collaterally attack the award under the guise of a motion to set aside the judgment confirming the award." *Lafarge*, 791 F.2d at 1339. The district court had denied a Rule 60(b) motion seeking to vacate a judgment confirming an arbitration award. The appellant argued that fraud and newly discovered evidence justified relief under Rule 60(b). However, the alleged fraud occurred during the arbitration proceedings - - the appellant did not allege "any fraud, misrepresentation or misconduct in the court proceedings. Fraud alleged in the

arbitration does not render the judgment fraudulently obtained." *Id.* at 1338. Further, the Ninth Circuit found that the appellant's Rule 60(b) motion was filed approximately one year after the arbitration award was rendered, which was outside the three month period provided in the FAA for seeking relief under §§ 10 or 11. Finding that "direct attack of the award pursuant to section 10 of the [FAA] is foreclosed," the court concluded that the award could not be collaterally attacked "under the guise of a motion to set aside the judgment confirming the award." *Lafarge*, 791 F.2d at 1339.

The Eleventh Circuit's decision in the instant case conflicts with the D.C. Circuit's decision in *Washington-Baltimore Newspaper Guild*, the Fourth Circuit's decision in *e.spire Commc'ns.* and the Ninth Circuit's decision in *Lafarge*. Each of the other circuits recognized that a federal court may not use Rule 60(b) to review the merits of arbitration awards. In *Washington-Baltimore Newspaper Guild*, the Second Circuit held that Rule 60(b) was inapplicable to judgments entered on arbitration awards. In *e.spire Commc'ns.*, the Fourth Circuit recognized that Rule 60(b) may not be used to avoid the exclusive grounds for vacating an arbitration award provided in the FAA. Similarly, in *Lafarge*, the Ninth Circuit specifically ruled out a collateral attack on an arbitration award under the guise of a motion for relief from the judgment confirming the award.

In contrast, the Eleventh Circuit allowed the District Court to use Rule 60(b) to impermissibly review the merits of the underlying arbitration

award. It is undisputed that at the time of the arbitration proceedings, AMC possessed the evidence that it later offered the District Court to show alleged satisfaction of the judgment. It is also undisputed that the evidence went directly to the merits of the questions presented to the arbitrators. In fact, the District Court originally used the same evidence to conclude that there was an "evident material mistake" in the evidence presented to and considered by the arbitrators. By allowing the District Court to use the same evidence to show satisfaction of the judgment, the Eleventh Circuit approved a collateral attack on the award itself. AMC received much more than just a "rematch" - - it received a judgment in its favor without having to present any evidence to the agreed-upon decision makers.

IV. THIS CASE RAISES THE IMPORTANT QUESTION OF WHETHER RULE 60(b) IS AVAILABLE TO REVIEW THE MERITS OF ARBITRATION AWARDS UNDER THE FAA.

A. Introduction

There is a pressing need for this Court to clarify whether federal courts may apply standards other than those found in §§ 10 and 11 of the FAA in court proceedings involving review of arbitration awards under the FAA. In *Hall Street*, this Court stated in, *dicta*: "we do not purport to say that [§§ 10 and 11] exclude more searching review based on authority outside the statute as well." *Hall Street*, 128 S. Ct. at 1406. However, the Court also

questioned whether "manifest disregard of the law" constituted a viable independent ground for reviewing arbitration awards under the FAA. Rule 60(b) is outside the statute, but is allegedly rendered applicable to judicial proceedings on arbitration awards through § 13 of the FAA. This case presents the Court with an opportunity to clarify that §§ 10 and 11 remain the exclusive grounds for reviewing arbitration awards under the FAA.

Despite its semantics, the District Court examined the factual basis of the arbitration award and substituted its own judgment for the arbitrators' judgment. Unquestionably this would have been improper prior to entry of the judgment. However, does § 13 of the FAA render §§ 10 and 11 impotent after a judgment is entered? The District Court and the Eleventh Circuit have incorrectly concluded that it does. The Eleventh Circuit's decision: (1) opens the door for misapplication of Rule 60(b) to allow courts to perform an "end run around the FAA" and avoid the FAA's narrow scope of review; (2) sanctions the use of Rule 60(b) to reopen issues of fact previously decided in arbitration; (3) and allows Rule 60(b) to be used to grant relief that is unavailable in confirmation proceedings. Such a result undermines the essential purpose of the FAA. The question presented is of such importance to the scope of federal court review of judgments confirming arbitration awards that it merits review and decision by this Court.

B. Rule 60(b) Does Not Provide A Means to Avoid the FAA's Narrow Scope of Review

The FAA's purpose is "to relieve congestion in the courts and to provide parties with an alternative method for dispute resolution that is speedier and less costly than litigation." *Baker I*, 508 F.3d at 1001. This case provides a glaring example of how the promise of expedited review of arbitration awards is defeated when a court interjects itself into the merits of an arbitration proceeding. Since shortly after the arbitrators rendered their decision in 2003, the District Court has frustrated the FAA's purpose by improperly entering orders regarding the amount AMC owes Baker based on value judgments. The arbitrators decided how much AMC owed Baker based on the evidence presented to them. The District Court decided that the evidence reflected a "mistake." As a result, the District Court determined that AMC made a "material mistake" in the arbitration proceedings. When the District Court's first attempt to overrule the arbitrators was unsuccessful, it changed tacks. The District Court entered judgment on the award, then took the same evidence it had considered before and applied it to reduce the judgment. Clearly, the District Court, with the Eleventh Circuit's acquiescence, merely performed an "end run" around the FAA to reach the desired result. And it only took six (6) years to do so.

Parties who choose arbitration to resolve their disputes necessarily agree "to accept whatever reasonable uncertainties might arise from the

process." *Raiford v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 903 F.2d 1410, 1413 (11th Cir. 1990). Arbitration itself is merely a contractual agreement to have a third party (not a court) resolve a dispute. The agreement sets the parameters of the arbitrator's authority. However, an award rendered by an arbitrator is not self-executing. Therefore, the FAA provides for judicial enforcement of arbitration awards. Under the FAA, parties may obtain expedited review of an award without having to re-prove their case. The court's only role is to determine whether there has been gross misconduct or an obvious mistake that falls within §§ 10 or 11 of the FAA. If no grounds for vacating or modifying the award exist, then the court "must" enter judgment confirming the award. 9 U.S.C. § 9. Section 13 of the FAA cannot expand upon §§ 10 or 11 without threatening the whole statutory framework or the very purpose of arbitration. Certainly, § 13 should not be read to allow a procedural rule to provide a substantive basis for relief from an arbitration award.

The Federal Rules themselves recognize that the FAA limits their application. Rule 1 states that the Federal Rules apply only to matters of procedure and not to substantive law. See Fed. R. Civ. P. 1. Rule 81 provides that the Federal Rules govern procedures under the FAA only to the extent that the FAA does not provide other procedures. Fed. R. Civ. P. 81(a)(6(B). The Federal Rules clearly are to be applied deferentially to the FAA in proceedings involving arbitration awards. Accordingly, the use of Rule 60(b) to provide substantive review of an

arbitration award is inconsistent with both the FAA and the Federal Rules.

C. Rule 60(b) Does Not Allow Courts to Re-Open Issues Fully and Finally Decided in Arbitration

A procedural rule such as Rule 60(b) cannot be used to reopen the merits of an arbitration award. *See LaFarge*, 791 F.2d at 1339 (a party "may not . . . collaterally attack [an arbitration award] under the guise of a motion to set aside the judgment confirming the award"). *See also Major League Baseball Players Ass'n v. Garvey*, 532 U.S. at 509, 121 S. Ct. at 1728 ("courts . . . have no business weighing the merits of the grievance or considering whether there is equity in a particular claim"). Accordingly, a party is not "permitted to relitigate the merits of its [arbitration] claim" in district court. *O.R. Sec., Inc. v. Professional Planning Assoc.s, Inc.*, 857 F.2d 742,748. (11th Cir. 1988). In fact, to allow a court to do so would subvert the principles underlying narrow review of arbitration awards. However, the Eleventh Circuit's decision sanctions federal court review of the merits of arbitration awards through the use of Rule 60(b).

The Eleventh Circuit apparently accepted the District Court's protestations that it was "not reviewing the *merits* of the arbitration award." (App. 37a). (emphasis in original). In fact, that is precisely what the District Court did! The ultimate purpose of the arbitration was to determine the amount AMC owed Baker. The arbitrators did not

render a decision regarding AMC's tax liability in the abstract. The arbitrators determined the specific amount that AMC owed Baker. The arbitrators fully and finally resolved the amount AMC owed Baker as of the date of the award. Inherent in the award is the recognition that AMC and Baker were given all credits they were entitled to up to the date of the decision.

The FAA does not excuse a party's failure to exercise due diligence in arbitration proceedings. *See, e.g., Bonar v. Dean Witter Reynolds, Inc.*, 835 F.2d 1378, 1383 (11th Cir. 1988). In the instant case, the sole reason that evidence of the payment was not presented to the arbitrators is because of AMC's gross negligence. The District Court could not "correct" AMC's negligence using Rule 60(b) any more than it could in the confirmation proceedings. Doing so necessarily involved re-opening issues fully and finally decided by the arbitrators.

D. Rule 60(b) May Not Be Used to Provide Relief That Is Not Available In Confirmation Proceedings

Rule 60(b)'s application is limited to relief that a party could obtain from the trial court in the first instance. *See Bear Valley Mut. Water Co. v. R.A. Riddell*, 493 F.2d 948, 950 (9th Cir. 1974) (recognizing that Rule 60(b) does not authorize a court to grant a party relief the party would not be entitled to at trial). With respect to judgments on arbitration awards, Rule 60(b) is available to grant relief based on matters that were within the scope of

judicial confirmation proceedings but cannot be used to broaden review of the underlying arbitration award. *See LaFarge*, 791 F.2d at 1338. This is consistent with the intent of the rule: "Rule 60(b) does not assume to define the substantive law as to the grounds for vacating judgments, but merely prescribes the practice in proceedings to obtain relief." Fed. R. Civ. P. 60(b), Adv. Comm. Notes (1946 Amendment). The evidence the District Court relied on to grant AMC relief under Rule 60(b) could not have been considered in the judicial confirmation proceedings. Because AMC was not entitled to a credit for the alleged tax payment in the confirmation proceedings, the District Court could not properly grant such a credit under Rule 60(b).

V. CONCLUSION

For each of the foregoing reasons, the Court should grant Baker's Petition.

Respectfully submitted,

JAMES A. HARRIS, JR.
Counsel of Record
CLYDE O. "TRES" WESTBROOK, III
2501 20th Place South, Suite 450
Birmingham, AL 35223
(205) 871-5777

March 5, 2010

APPENDIX

AIG BAKER STERLING HEIGHTS, LLC, A.B. OLATHE II LIMITED PARTNERSHIP v. AMERICAN MULTI-CINEMA, INC.

NO. 08-14600

In The United States Court of Appeals for The Eleventh Circuit

AUGUST 18, 2009

Before DUBINA, Chief Judge, EDMONDSON and KRAVITCH, Circuit Judges.

EDMONDSON, Circuit Judge:

This appeal is about a district court's power to grant some relief from its judgment.

Several years ago American Multi-Cinema, Inc. (American) arbitrated a tax dispute with AIG Baker Sterling Heights, LLC and A.B. Olathe II LP (collectively, Baker), from whom American leased space in shopping centers. The arbitration panel concluded that American owed Baker under the terms of their lease agreements almost a million dollars to cover a portion of the taxes on those properties. But after the panel issued the award, American learned that it had already paid some of the taxes directly to the taxing authority. Then, in the district court, American, claiming a mistake in the award, sought modification of it to reflect the tax actually already paid. The district court accepted American's argument and revised the award, but

this Court reversed on appeal in AIG Baker Sterling Heights, LLC v. Am. Multi-Cinema, Inc., 508 F.3d 995 (11th Cir. 2007) (Baker I).

On remand, the district court, per Baker I, entered a judgment confirming entirely the arbitration award. But the case did not stop there: the district court later granted American some relief -- under Fed. R. Civ. P. 60(b)(5) -- from the judgment to account for the taxes American had paid to the taxing authority.[1] Baker appeals this latter decision. Baker says that the district court violated the mandate in Baker I and went beyond the exclusive grounds for modifying an arbitration award under the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-16. Seeing no error, we affirm the district court order.

Background

American leased space from Baker in shopping centers located in Michigan and Kansas. The lease agreements required American to pay to Baker money to cover some of the taxes on those properties, and Baker was to pay the taxing authority all money due. A dispute arose over the amount of money that American owed Baker. The parties agreed to arbitrate the dispute in Kansas City, Missouri, and the arbitration panel awarded $866,425.18 to Baker.

---

[1] We include the pertinent orders in an appendix to our opinion.

A portion of the award -- $226,771.76 -- represents money American owed Baker for taxes on the Kansas property in 2002. Ownership of the Kansas property changed in the middle of 2002, and the new landlord that replaced Baker then asked American to pay tax money that American owed Baker for the first half of 2002 directly to the taxing authority. American made the payment but has since realized that it should have paid Baker and that Baker should have paid the taxing authority. At the time of the arbitration, American, however, presented none of this "taxes-paid" information; instead, American stipulated that it paid to Baker no money for taxes on the Kansas property in 2002.

After arbitration, Baker filed an action in the Northern District of Alabama to confirm the arbitration award. American filed an answer and counterclaim in the Alabama district court and filed a separate action in the Western District of Missouri to modify the arbitration award to reflect the taxes American had paid to the taxing authority. The Missouri district court transferred its action to the Alabama district court, which consolidated the two cases. The Alabama district court then granted American's motion for modification of the arbitration award on the basis of an "evident material mistake" and reduced the award to account for the tax payment. Baker appealed.

The Court reversed on appeal in Baker I. We said, among other things, that American's failure to identify the taxes it paid to the taxing authority in the facts stipulated at arbitration was no "evident

material mistake" within the meaning of the FAA. Baker I, 508 F.3d at 999-1000. We, therefore, concluded that the district court erred in modifying the arbitration award and remanded the case for further proceedings. Id. at 1003.

On remand, the district court held a status conference. The district court informed the parties that it wanted to credit American for the actual payment to the taxing authority and asked the parties to brief how the district court could legitimately accomplish that goal. In response, American suggested that the district court take two steps: first, enter a judgment confirming the arbitration award; and, second, grant American relief from the judgment under Rule 60(b)(5) on the ground that the earlier tax payment had satisfied some of the judgment. The district court adopted this approach over Baker's objections. Baker now appeals the decision to grant American some relief from the district court's judgment.

Standard of Review

We review the grant of relief under Rule 60(b) for an abuse of discretion. High v. Zant, 916 F.2d 1507, 1509 (11th Cir. 1990). We review legal conclusions *de novo* and factual findings for clear error. Young v. New Process Steel, LP, 419 F.3d 1201, 1203 (11th Cir. 2005); Reynolds v. McInnes, 338 F.3d 1221, 1226 (11th Cir. 2003).

Discussion

Baker claims that the district court abused its discretion in several ways by granting American relief from the judgment in this case. But we see only two that deserve much attention. First, Baker contends that the district court ignored the law of the case and the mandate established by Baker I. Second, Baker asserts that the district court violated the FAA by modifying the arbitration award for a reason not authorized by that statute.

1. The Law of the Case Doctrine & the Mandate Rule

The law of the case doctrine and the mandate rule ban courts from revisiting matters decided expressly or by necessary implication in an earlier appeal of the same case. Barber v. Int'l Bhd. of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers, & Helpers, Dist. Lodge No. 57, 841 F.2d 1067, 1070-73 (11th Cir. 1988). But neither principle applies "when the issue in question was outside the scope of the prior appeal." Transamerica Leasing, Inc. v. Inst. of London Underwriters, 430 F.3d 1326, 1332 (11th Cir. 2005); see also Barber, 841 F.2d at 1070 ("The lower court may consider anew issues not within [the mandate's] compass.") (internal quotation marks omitted). Here, Baker claims that the district court violated both principles on remand. We disagree.

In Baker I, we spoke in pertinent part about the power of courts to correct an "evident material

mistake" in an arbitration award. Baker I, 508 F.3d at 999-1001. We said that the FAA "embraces only an evident material mistake that appears in a description in the award," and noted that a mistake occurs when an arbitrator understands "wrongly" or identifies "incorrectly." Id. at 999. We, however, saw no "evident material mistake" in the award before us because American sought modification of the award to remedy its *own* failure to inform the panel of the payment to the taxing authority. Id. at 999-1000. We vacated the modified award and sent the case back to the district court. Id. at 1003.

On remand, the district court entered a judgment entirely confirming the award. Then the district court granted American relief from the district court's judgment (not the award) to reflect the earlier payment to the taxing authority. Baker argues that this latter decision violated the law of the case and the mandate from the earlier appeal. But as we have pointed out, we discussed in Baker I only modification of the award; we decided nothing expressly or by necessary implication about the district court's power to grant American relief from a district court judgment or to consider evidence of the payment to the taxing authority. Baker I, therefore, has no decisive role to play here.[2] The district court did not violate the law of the case doctrine or the mandate rule on remand.

---

[2] We stress that the final order and judgment before us in Baker I is materially different from the final order and judgment before us today.

2. The FAA

The FAA severely limits judicial vacatur and modification of an arbitration award. As the Supreme Court recently confirmed, sections 10 and 11 of the FAA offer the exclusive grounds for expedited vacatur or modification of an award under the statute. Hall Street Assocs. v. Mattel, Inc., 128 S. Ct. 1396, 1403 (2008). Baker claims that the district court ignored this restriction when it -- for reasons not listed in sections 10 or 11 -- gave American credit against the district court's judgment for the payment to the taxing authority. We do not see, though, how those FAA sections control in the circumstances of this appeal: the district court neither vacated nor modified the arbitration award. Instead, the district court entered a judgment confirming the award and about two months after that granted American some relief from the judgment under Rule 60(b)(5).[3] Sections 10

---

[3] Nor did the district court, as Baker contends, revisit the merits of a matter decided at arbitration. The panel addressed three specific questions: (1) How much money must American pay Baker for taxes under the terms of their lease agreements? (2) How much money has American already paid Baker for taxes under the terms of their lease agreements? and (3) How much money does American, therefore, owe Baker for taxes under the terms of their lease agreements? The district court in no way disturbed the panel's answers to those questions; the district court focused solely on the taxes American had paid to the taxing authority -- not to Baker -- and how the money paid for the taxes satisfied some of the tax money obligation the panel concluded that American owed Baker under the terms of their lease agreements.

and 11 say nothing about court judgments and do not control this appeal.

We instead turn our attention to section 13 of the FAA. That provision says that a judgment confirming an arbitration award, once entered, has the same force and effect as a judgment in a standard civil action and *is subject to all the provisions of law relating to those judgments.* 9 U.S.C. § 13; see also Parsons & Whittemore Ala. Mach. & Servs. Corp. v. Yeargin Constr. Co., 744 F.2d 1482, 1484 (11th Cir. 1984). The provisions of law include Rule 60(b).[4] See, e.g., Fid. Fed. Bank, FSB v. Durga Ma Corp., 387 F.3d 1021, 1023-24 (9th Cir. 2004) (stating that "judgment confirming an arbitration award is treated similarly to any other federal judgment" and concluding that district court did not abuse its discretion when it corrected judgment confirming arbitration award under Rule 60(b)); Baltia Air Lines, Inc. v. Transaction Mgmt., Inc., 98 F.3d 640, 642 (D.C. Cir. 1996) (stating that "Rule 60(b) is an appropriate vehicle by which to challenge a judgment confirming an arbitration award"); Clarendon Nat'l Ins. Co. v. TIG Reinsurance Co., 186 F.R.D. 112, 117 (S.D.N.Y.

---

[4] Fed. R. Civ. P. 81(a)(6)(B) says that the Federal Rules of Civil Procedure apply in actions related to arbitration "to the extent applicable" and except as otherwise provided for in the FAA. We accept that this language may mean that courts cannot use Rule 60(b) to modify or vacate an arbitration award or, perhaps, to grant relief from a judgment confirming an award for reasons covered in sections 10 or 11 of the FAA. This appeal is different, however; it is about partial payment of a judgment debt.

1998) (section 13 of FAA provides that judgments confirming arbitration awards are subject to Rule 60(b)).

Under Rule 60(b), a court may relieve a party from a judgment if "the judgment has been satisfied, released, or discharged ...." Fed. R. Civ. P. 60(b)(5). This authority encompasses the power to declare a judgment satisfied "when damages are paid before trial or a tortfeasor or obligor has paid the judgment debt." Gibbs v. Maxwell House, A Div. of Gen. Foods Corp.,738 F.2d 1153, 1155 (11th Cir. 1984).

Two old cases involving Rule 60(b) seem particularly pertinent here. In Ferrell v. Trailmobile, Inc., 223 F.2d 697 (5th Cir. 1955), a defendant allegedly failed to pay one of eighteen installments on a truck trailer. Id. at 698. Although the defendant claimed that he had made the payment, the district court entered a judgment in favor of the plaintiff. Id. The defendant later secured copies of documents that conclusively proved that he made the disputed payment; so, he moved the district court for relief from the judgment under Rule 60(b). Id. The district court denied the request. Id. This Court reversed on appeal and said

"[i]f, in fact, practically conclusive evidence shows that the [defendant] had actually paid all eighteen installments for the purchase of the trailer, it is obvious that the judgment should be set aside to prevent a manifest miscarriage of justice." Id. We remanded the case for a hearing on the Rule 60(b) motion. Id. at 699.

This Court later reached a similar result in Johnson Waste Materials v. Marshall, 611 F. 2d 593 (5th Cir. 1980). In Marshall, the government sued several defendants for violating the Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-19. Id. at 595. At trial, the government introduced employee-testimony on the number of hours worked and the wages paid; the defendants offered no documentary evidence to rebut the testimony and were found liable. Id. at 595-96. More than a year later, the defendants moved to set aside or reform the judgment under Rule 60(b) after locating cancelled payroll checks and other evidence that established that the plaintiffs were due less than awarded to them at trial. Id. at 596. The district court concluded, however, that the evidence was neither newly discovered nor secured through due diligence and denied the defendants any relief. Id. at 597.

We reversed on appeal. Id. at 601. We said that the defendants, to receive relief from the judgment under Rule 60(b)(5), were not obligated to produce newly discovered evidence or to demonstrate due diligence in securing that evidence. Id. at 599. Instead, we said that the defendants needed only to produce conclusive evidence that they partially satisfied the judgment. Id. at 599-600. To rule otherwise, we stressed, would effectively grant the plaintiffs a windfall: "Reducing the judgment . . . by the amount that defendants have already paid will not deprive the employees of the wages that they properly earned. When defendants pay the remainder of the judgment, the employees will have received the full amount to which the trial court

determined they were entitled. *They will only be denied a windfall recovery."* Id. at 600-01 (emphasis added).

The district court found the reasoning in Ferrell and Marshall applicable here. The district court stated that American presented "unrefuted evidence" of the payment to the taxing authority, including copies of the pertinent checks and affidavits showing that Baker paid no portion of the pertinent taxes.[5] Based on that evidence, the district court concluded that American had already satisfied some of the judgment against it and, therefore, was entitled to some relief under Rule 60(b)(5). The district court declared that its decision avoided Baker's "knowing receipt of a quarter-of-a-million dollar windfall." We see no abuse of discretion in this decision.

We begin with Ferrell and Marshall. We accept that those decisions do not fit perfectly here: they involved judgments entered after civil trials and not after arbitration. But section 13 of the FAA provides that a judgment which has confirmed an award is to be treated no better or worse than any other civil judgment: "The judgment so entered shall

---

[5] American submitted to the district court copies of the cancelled checks that American sent to the taxing authority and the payment receipts from the taxing authority. American also submitted affidavits that said that American paid the 2002 taxes directly to the taxing authority, Baker paid no portion of the 2002 taxes to the taxiing authority, and Baker owes no taxes to the taxing authority for 2002. Baker introduced nothing to rebut this evidence.

have the same force and effect, in all respects, as, and be subject to all the provisions of law relating to, a judgment in an action; and it may be enforced as if it had been rendered in an action in the court in which it is entered." 9 U.S.C. § 13. So, the district court did not err by extending our precedents dealing with judgments in civil actions to the case before it.

Considering the law, we turn to the facts found by the district court in this case. Like the defendants in Ferrell and Marshall, American submitted conclusive evidence to the district court that American paid the taxes on the Kansas property directly to the taxing authority and thereby had satisfied some of the judgment against American.[6] Baker, although given every

---

[6] Baker asserts that the district court erred in finding that American partially satisfied the judgment. Baker says that the many years between the payment to the taxing authority and the entry of judgment, as well as that Baker did not physically receive the payment, precludes the payment from satisfying the judgment. But Baker cites no authority for this position, and we are not persuaded by it. See Torres-Troche v. Municipality of Yauco, 873 F.2d 499, 501 n.7 (1st Cir. 1989)("Rule 60(b)(5) should serve as the basis for a motion to correct, regardless of the time at which a judgment is satisfied. The Rule should not be interpreted so strictly that it forecloses a litigant from alerting a court to the prior satisfaction of a final judgment.").

Nor did the district court give American credit for an amount greater than the $226,771.76 the arbitration panel concluded that American owed Baker for the 2002 taxes. The amended final order explicitly states that the district court granted American "partial relief from [the] judgment in the

opportunity to do so, never contradicted the evidence of payment or denied that the tax payment satisfied the obligation Baker would have otherwise had to pay to the taxing authority. Baker directly benefited concretely from American's payment to the taxing authority. In the light of the facts as well as the precedents, we cannot say that the district court abused its discretion by granting American some relief from the judgment under Rule 60(b)(5).

Conclusion

We affirm the order of the district court.

AFFIRMED.

Filed: August 18, 2009

Issued as Mandate: October 30, 2009

---

amount of $326,197.52, *representing $226,771.76 in taxes previously paid to the taxing authority* plus $99,425.76 in prejudgment interest on that amount . . . ." (emphasis added).

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
ALABAMA SOUTHERN DIVISION

AIG BAKER STERLING HEIGHTS, LLC, A.B. OLATHE II LIMITED PARTNERSHIP,	)	
Plaintiffs,	)	CONSOLIDATED LEAD CASE: CV-03-BE-1930-S
v.	)	
AMERICAN MULTI-CINEMA, INC.	)	MEMBER CASE: CV-03-BE-2901-S
Defendant.	)	

FINAL ORDER

This case is before the court on remand from the Eleventh Circuit Court of Appeals. *See AIG Baker Sterling Heights, L.L.C. v. American Multi-Cinema, Inc.*, 508 F.3d 995 (11th Cir. 2007). For the reasons stated in the memorandum opinion entered contemporaneously, the court CONFIRMS the arbitrators' award of $866,425.18, and ENTERS JUDGMENT in favor of Plaintiff AIG Baker Sterling Heights, LLC in the amount of $1,151,523.31 ($866,425.18 plus $285,098.13 in prejudgment interest, consistent with the Plaintiff's calculation in

doc. 49). AMC has already paid $539,375.75, with a balance of $612,147.56 remaining to be paid on the judgment. This judgment shall not be duplicative of the arbitration award itself, and Plaintiff may not seek to recover double this amount by enforcing both the arbitration award and this judgment.

This case is hereby DISMISSED WITH PREJUDICE,[1] costs taxed as paid.

DONE and ORDERED this 1st day of May, 2008.

s/ Karon O. Bowdre
KARON OWEN BOWDRE
UNITED STATES DISTRICT JUDGE

---

[1] As noted previously, this court did not decide AMC's counterclaims for CAM fee offsets on the merits, *see* doc. 31; therefore, that part of the court's decision is without prejudice.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
ALABAMA SOUTHERN DIVISION

AIG BAKER STERLING HEIGHTS, LLC, A.B. OLATHE II LIMITED PARTNERSHIP,	)	
Plaintiffs,	)	CONSOLIDATED LEAD CASE: CV-03-BE-1930-S
v.	)	
AMERICAN MULTI-CINEMA, INC.	)	MEMBER CASE: CV-03-BE-2901-S
Defendant.	)	

AMENDED FINAL ORDER

For the reasons stated in the memorandum opinion entered contemporaneously, the court hereby GRANTS "Defendant American Multi-Cinema's Motion for Partial Relief For Judgment Pursuant to Rule 60(b)(5)" (doc. 59) and Plaintiffs' "Motion to Amend or Modify Final Order" (doc. 61). Accordingly, the court amends and restates its judgment of May 1, 2008 as follows:

This case is before the court on remand from the Eleventh Circuit Court of Appeals. *See AIG Baker Sterling Heights, L.L.C. v. American Multi-Cinema, Inc.*, 508 F.3d 995 (11th Cir. 2007). For the reasons stated in the memorandum opinion entered

on May 1, 2008, the court CONFIRMS the arbitrators' award of $866,425.18, and ENTERS JUDGMENT in favor of Plaintiffs AIG Baker Sterling Heights, L.L.C. and A.B. Olathe II Limited Partnership, jointly, in the amount of $1,151,523.31 ($866,425.18 plus $285,098.13 in prejudgment interest, consistent with the Plaintiffs' calculation in doc. 49).

Pursuant to Rule 60(b)(5), the court grants Defendant American Multi-Cinema, Inc. ("AMC") partial relief from this court's judgment in the amount of $326,197.52, representing $226,771.76 in taxes previously paid to the taxing authority plus $99,425.76 in prejudgment interest on that amount, with a net balance of $825,325.79 due directly to Plaintiffs. AMC has already paid Plaintiffs $539,375.75, and deposited with the court $285,950.44, which the Clerk of Court disbursed to Plaintiffs' counsel on June 16, 2008. Therefore, nothing remains to be paid on the judgment.[1] This judgment shall not be duplicative of the arbitration award itself, and Plaintiffs may not seek to recover double this amount by enforcing both the arbitration award and this judgment.[2]

The costs incurred in this proceeding are taxed as paid.

---

[1] AMC deposited forty cents too much with the court, but did not oppose Plaintiffs' withdrawal of the forty-cent overage. *See* doc. 69.

[2] This court previously dismissed AMC's counterclaims for CAM fees without prejudice. *See* doc. 31.

DONE and ORDERED this 17th day of July, 2008.

s/ Karon O. Bowdre
KARON OWEN BOWDRE
UNITED STATES DISTRICT JUDGE

KRAVITCH, J., concurring in part and dissenting in part:

I concur in Part 1 of the majority's opinion, holding that the district court did not violate the mandate of AIG Baker Sterling Heights, LLC v. American Multi-Cinema, Inc., 508 F. 3d 995 (11th Cir. 2007) ("Baker I") by modifying the arbitration award under Federal Rule of Civil Procedure 60(b)(5).

In Part 2, the majority affirms the district court's application of Federal Rule of Civil Procedure 60(b)(5) to amend the judgment confirming the arbitration award. Because, however, I believe that the Federal Arbitration Act (the "FAA") does not allow modification of arbitration awards in the manner used by the district court, I respectfully dissent from Part 2 of the majority's decision.

It is well-established that judicial review of arbitration awards is "narrowly limited." Baker I, 508 F.3d at 999 (quoting Rosensweig v. Morgan Stanley & Co., 494 F.3d 1328, 1333 (11th Cir. 2007)). An arbitration decision may be reversed only rarely, and "the fact that a court is convinced [the arbitrator] committed serious error does not suffice to overturn his decision." Major League Baseball Players Ass'n v. Garvey, 532 U.S. 504, 509 (2001); see also O.R. Sec., Inc. v. Prof'l Planning Assocs., Inc., 857 F.2d 742, 747 (11th Cir. 1988) (holding that allowing relitigation of the merits of a claim would violate the basic purpose of the FAA to create a fast, inexpensive resolution of disputes). The FAA itself

provides limited grounds upon which a court may undo an arbitration award. See 9 U.S.C. §§ 10, 11. This court already determined in Baker I that the arbitration award in this case, however, could not lawfully be modified under those provisions.

The majority holds that Rule 60(b)(5) may be used to modify a judgment confirming an arbitration award even though the same arbitration award may not be modified under the FAA. Although the Federal Rules apply to court proceedings involving arbitration awards, see Fed. R. Civ. P. 81(a)(6)(B), they apply "only to the extent that matters of procedure are not provided for in those statutes." O.R. Sec., Inc., 857 F.2d at 745. Because the FAA provides for methods to correct an arbitration award, see 9 U.S.C. §§ 10, 11, the Federal Rules should not be read to provide alternative ways to modify arbitration awards. Furthermore, Rule 60(b) should not be used to circumvent other requirements of the law. Pitchess v. Davis, 421 U.S. 482, 489-90 (1975) (holding that Rule 60(b) cannot be used to alter a conviction which was barred from review under habeas rules). It is obvious from the procedural history in this case that Rule 60(b) was used as an end run around the FAA after §§ 10 and 11 were found to be inapplicable. The district court unsuccessfully attempted to modify the award under the FAA, sought advice from the litigants about how to get around the frustration of that attempt, and then relied on Rule 60(b) to do exactly what it had been told was impossible under the FAA. The FAA prevents courts from using Rule 60(b) in this manner to avoid the strict limitations on judicial

review set forth in the FAA. See Lafarge Conseils et Etudes, S.A. v. Kaiser Cement & Gypsom Corp., 791 F.2d 1334, 1338-39 (9th Cir. 1986) (holding that FAA modification provisions provide the exclusive means by which an arbitration award may be modified and, therefore, Rule 60(b) may not be used to modify a judgment confirming such an award); Corey v. New York Stock Exch., 691 F.2d 1205, 1212-13 (6th Cir. 1982) (finding that "[t]he [FAA] provides the exclusive remedy for challenging an award"). In Hall Street Assocs., LLC v. Mattel, Inc., 128 S.Ct. 1396 (2008), the Supreme Court recently emphasized the narrow nature of the judicial review permitted under the FAA. The Court held that parties could not contractually agree in an arbitration agreement to expand judicial review of arbitration proceedings. Id. at 1400-01. The Court explained that such arbitration agreement provisions are void because §§ 10 and 11 of the FAA "provide the FAA's exclusive grounds for expedited vacatur and modification" of arbitration awards. Id. at 1403. The Court further stated that the modification and vacatur provisions should be read as the exclusive means for modifying an arbitration award because "[a]ny other reading opens the door to the full-bore legal and evidentiary appeals that an 'rende[r] informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process,' and bring arbitration theory to grief in post-arbitration process." Id. at 1405 (quoting Kyocera Corp. v. Prudential-Bache Trade Servs, Inc., 341 F.3d 987, 998 (9th Cir. 2003)) (alteration in original). Just as the parties may not use contract law to avoid the exclusive nature of the FAA

modification provisions, the courts cannot use the Federal Rules of Civil Procedure to re-open arbitrated issues.[1]

American and the majority rely on two cases for the proposition that American's own failure to uncover the evidence of its payment of the 2002 taxes through due diligence should not prevent the court from using Rule 60(b)(5): Ferrell v. Trailmobile, 223 F.2d 697 (5th Cir. 1955) and Johnson Waste Materials v. Marshall, 611 F.2d 593 (5th Cir. 1980). These cases show that Rule 60(b) may be used to reform judgments based upon post-judgment-discovered evidence that the judgment

had been paid, even if that evidence could have been discovered at the time of trial. Although Ferrell and Johnson Waste would excuse American's failure to discover the payments before trial, these cases do

---

[1] American cites to language from Hall Street stating that §§ 10 and 11 do not exclude review "based on authority outside the statute," 128 S.Ct. at 1406, in support of its argument that the Federal Rules may used to modify judgments. The above language in Hall Street, however, was followed with the statement that "[t]he FAA is not the only way into court for parties wanting review of arbitration awards: they may contemplate enforcement under state statutory or common law . . . ." Id. The Court then discussed cases involving enforcement of arbitration awards through statutes other than the FAA. Thus, I read the above language to refer only to alternatives for enforcing an arbitration award, and not to suggest that parties enforcing an award under the FAA may replace certain provisions of the FAA with other legal authorities. Here, Baker sought enforcement through the FAA, and American has never contested the applicability of the FAA.

not involve arbitration awards and therefore do not support the conclusion that Rule 60(b)(5) may be applied to actions confirming arbitration awards.[2]

Because I believe that Rule 60(b) may not be lawfully applied to modify an arbitration award, I would reverse. See Wexler v. Lepore, 385 F.3d 1336, 1338 (11th Cir. 2004) ("An error of law constitutes an abuse of discretion.").

Moreover, it is unclear to me that Rule 60(b)(5) would apply to the facts of this case, even if it were generally applicable to judgments confirming arbitration awards.

---

[2] Ferrell and Johnson Waste demonstrate that Rule 60(b) should be used to avoid an inequitable result. Courts, however, frequently allow inequitable or erroneous arbitration decisions to stand in order to effectuate the national policy favoring quick resolution of disputes through binding arbitration. See e.g., Hall Street, 128 S.Ct. at 1409 (upholding an arbitration decision despite the presence of what the dissent called "a rather glaring error of law"). Furthermore, I do not agree with the majority that the equities so one-sidedly favor American. American was the one who failed to review its own accounting records and discover the paid taxes. And American stipulated before the arbitration panel that it had paid $0 taxes on the property in question for 2002. Although Ferrell and Johnson Waste might excuse this lack of diligence, I still believe that American's fault in this case weighs against the use of Rule 60(b)(5) here. Also, there is an equitable interest in respecting the finality of the arbitrator's decision. See Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847 (1988) (Rehnquist, J. dissenting) ("[A] very strict interpretation of Rule 60(b) is essential if the finality of judgments is to be preserved.").

First, Rule 60(b) cannot be used to provide post-judgment relief to which that party would not have been entitled in the original judgment. See Bear Valley Mutual Water Co. v. Riddell, 493 F.2d 948, 950 (9th Cir. 1974). Here, American was not entitled to modification of the arbitration award based on its tax payment in the enforcement proceedings because it had no right to have the award modified under the FAA. Baker I, 508 F.3d at 1001. It is not, therefore, entitled to seek this relief under Rule 60(b)(5).

Second, this case differs in important ways from Ferrell and Johnson Waste, and, in my opinion, these distinctions render application of Rule 60(b)(5) inappropriate in this case, even if applicable to judgments confirming arbitration awards generally. In Ferrell, the dispute centered around the appellant's failure to make installment payments on a truck he purchased from the appellee. 223 F.2d at 698. At trial, the appellant asserted that he had made three payments, but the appellee denied it. Id. After judgment was entered against the appellant, he was able to obtain copies of the money orders showing that he had in fact made the payments. Id. This court held that, in light of such "practically conclusive evidence" that the payments had been made, "the judgment should be set aside to prevent a manifest miscarriage of justice." Id. In Johnson Waste, this court built upon Ferrell and concluded that a judgment may be reformed based upon evidence that a portion of the obligation from which the judgment arose had been paid, even if the payor could have discovered that evidence at trial through

the exercise of due diligence. 611 F.2d at 595. This court noted that this holding was appropriate in "the exceptional circumstance where the evidence of payment is virtually conclusive." Both Ferrell and Johnson Waste involved "practically conclusive evidence" that the judgments rendered by the district court had actually been satisfied by payments made by the losing party to the judgment-holding party prior to trial. Here, however, the evidence is not "practically conclusive" that the judgment was satisfied. First, the amount of American's previously-undiscovered payment to the taxing authority does not match the amount that the arbitrators determined American was obliged to pay for 2002 for the Kansas property. The arbitration decision states that American was liable for $226,770 whereas the evidence produced by American indicates that American paid the tax authority $248,624.57. This unexplained difference in liability calls into question the reliability of American's evidence. Accordingly, it was improper for the district court to offset the arbitration award by the full amount of American's payment to the county when it was greater than the amount of liability for that period found by the arbitration panel. Second, the payments made by American were not made to the party to whom it is obligated to pay the judgment. Thus, the court had to re-open questions resolved in the arbitration proceedings in order to determine whether the payment satisfied the obligation upon which the award was based.

The fact that American's evidence is not "practically conclusive" is crucial to the availability

of relief under Rule 60(b). See Ferrell, 223 F.2d at 698; see also Fleming v. New York Univ., 865 F.2d 478, 484 (2d Cir. 1989) (refusing to allow relief under Rule 60(b)(3) where the evidence presented was "a mixed bag" rather than the requisite "clear and convincing evidence," and noting that granting relief on such questionable evidence would allow relitigation of the merits on a 60(b) motion); Niedland v. Unites States, 338 F.2d 254, 260 (3d Cir. 1964) (refusing to apply Ferrell where the post-judgment evidence merely raised doubts – albeit "grave doubts" – as to the correctness of the judgment rather than offering conclusive proof that the judgment had been satisfied). Thus, even if I agreed that Rule 60(b)(5) could be applied to judgments confirming arbitration awards, I would limit such relief to cases involving uncontroverted, "practically conclusive" evidence that payments were made to the party that secured the judgment. Those circumstances are not present here.

For the foregoing reasons, I respectfully dissent from Part 2.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
ALABAMA SOUTHERN DIVISION

FILED Jul-18 AM 08:45 U.S. DISTRICT COURT
N.D OF ALABAMA

AIG BAKER STERLING HEIGHTS, LLC, A.B. OLATHE II LIMITED PARTNERSHIP, Plaintiffs,	)	CONSOLIDATED LEAD CASE: CV-03-BE-1930-S
v.	)	
AMERICAN MULTI-CINEMA, INC. Defendant.	)	MEMBER CASE: CV-03-BE-2901-S

MEMORANDUM OPINION

Before the court are "Defendant American Multi-Cinema's Motion for Partial Relief For [*sic*] Judgment Pursuant to Rule 60(b)(5)" (doc. 59) and Plaintiffs' "Motion to Amend or Modify Final Order" (doc. 61). In its motion, Defendant American Multi-Cinema, Inc. ("AMC") requests partial relief from this court's final judgment entered May 1, 2008 (doc. 58) on the ground that AMC has satisfied a portion of the judgment, which confirmed an arbitration award related to real estate taxes on property in Kansas. Plaintiffs AIG Baker Sterling Heights, L.LC. and A.B. Olathe II Limited Partnership (collectively, "AIG Baker") request in their motion

certain revisions to the court's final order, as discussed below. For the reasons that follow, the court will GRANT both motions.

I. RELEVANT BACKGROUND

This case arises out of an award issued in an arbitration proceeding between Plaintiff AIG Baker and Defendant AMC relating to AMC's responsibility for real estate taxes on two properties owned by AIG Baker and leased to AMC. The leases between AMC and AIG Baker provided that AMC would pay its share of real estate taxes to AIG Baker, which would then pay the taxing authority. The parties were unable to agree upon the proper amount of taxes for which AMC was responsible; they submitted their dispute to arbitration. On June 19, 2003, the arbitrators issued an award totaling $866,425.18, based in part on the parties' stipulated facts regarding AMC's potential tax liability on one of the properties located in Olathe, Kansas. The stipulated facts stated, in part, that AMC's potential tax liability on the property for the period January 1, 2002 through June 28, 2002 was approximately $226,771.00.[1] The stipulation further provided that AMC had made "$0.00" payments for that period.

Following the arbitrators' decision, AMC discovered that the stipulated facts did not reflect taxes AMC actually paid directly to the taxing

---

[1] The arbitrators ultimately concluded that AMC's share of the 2002 real estate tax liability was $226,771.76.

authority. Effective June 28, 2002, AIG Baker no longer owned the Kansas property at issue, and AMC's new landlord requested that AMC pay the taxes for the first half of 2002 - - during which time AIG Baker was still owner - - directly to the taxing authority. Accordingly, AMC paid $248,624.57 in real estate taxes directly to the taxing authority for the first half of 2002 instead of the "$0.00" payments as stated in the stipulation. When AIG Baker moved to confirm the arbitration award in this court, AMC contended that the failure of the stipulated facts to reflect this amount constituted a material mistake and that this court should modify the arbitration award, as authorized by the Federal Arbitration Act ("FAA") at 9 U.S.C. § 11(a). This court agreed, and concluded that the error in the stipulated facts constituted an "evident material mistake" justifying modification of the award. Having modified the award, the court denied AIG Baker's request for interest on the arbitration award from the time of the award until the court's judgment.

The Eleventh Circuit Court of Appeals reversed this court's decision. *See AIG Baker Sterling Heights, L.L.C. v. American Multi-Cinema, Inc.*, 508 F.3d 995 (11th Cir. 2007). The Court of Appeals looked to the "plain language of the [FAA]," and stated that "[t]o make a 'mistake' is to 'understand wrongly.'" *Id.* at 999 (quoting *Webster's II New Riverside University Dictionary* 759 (1984)). The arbitration panel, the Court noted, suffered from "ignorance," or a "lack of knowledge" - - not a wrong understanding. *Id.* at 999-1000.

Consequently, the Court of Appeals concluded that this court did not have the authority to modify the arbitration award on the basis of a "mistake."

The Court of Appeals also held that this court's denial of AIG Baker's request for prejudgment interest was error, whether based on federal law or based upon the court's modification of the arbitration award. The Court of Appeals "join[ed] our sister circuits that have addressed this question and h[e]ld that state law governs the availability and amount of prejudgment interest in diversity cases involving the Federal Arbitration Act." *AIG Baker,* 508 F.3d at 1002. The Court remanded the case to this court to determine which state's law governs prejudgment interest and to then apply that state's law to determine the availability and amount of prejudgment interest, if any.

On remand, this court, was required to confirm the arbitration award despite its disagreement with the definition of "mistake" used by the panel of the Eleventh Circuit Court of Appeals. *See* docs. 57 & 58. This court also looked to Alabama choice-of-law principles to determine whether prejudgment interest was governed by Alabama law or by Missouri law. Looking to "the place of performance," the court concluded that Missouri law applied primarily because the arbitration award, which was made pursuant to an agreement, and which took on a "distinct legal import," occurred in Missouri. Accordingly, the court confirmed the total arbitration award of $866,425.18 and awarded prejudgment interest at

the Missouri rate of 9% *per annum*. The court recognized that AMC had already paid AIG Baker $539,375.75 during the pendency of this action, leaving a balance of $612,147.56.

On May 7, 2008, AMC filed the current motion for partial relief from judgment pursuant to Fed. R. Civ. P. 60(b)(5). AMC requests relief from this court's final judgment in the amount of $226,771.76 - - the arbitrators' assessment of AMC's share of taxed for the period in which AMC paid taxes directly to the taxing authority - - plus the prejudgment interest on that amount. On May 8, 2008, AIG Baker filed its own motion to amend the final order. AIG Baker requests three modifications: (1) that the court delete that this case is "dismissed with prejudice;" (2) that the court rephrase its sentence regarding dismissal of AMC's counterclaims without prejudice; and (3) that judgment be entered in favor of both AIG Baker Sterling Heights, L.L.C. and A.B. Olathe II Limited Partnership.

On May 22, 2008, the court granted AMC's request to deposit with the court the undisputed balance of the judgment, $285,950.04. On June 3, 2008, AIG Baker moved to withdraw that amount plus interest; the court granted AIG Baker's request on June 16, 2008.

II. DISCUSSION

A. AMC's Rule 60(b)(5) Motion

AMC now requests, pursuant to Fed. R. Civ. P. 60(b)(5), that this court amend its final judgment to give AMC full credit for its direct payment to the taxing authority of the 2002 taxes at issue. Specifically, AMC requests a credit of $226,771.76 against this court's judgment confirming the arbitration award and relief from the prejudgment interest on that amount, $99,425.76.

Federal Rule of Civil Procedure 60(b)(5) provides, in relevant part:

> On motion and just terms, the court may relieve a party... from a final judgment, order, or proceeding [if] . . . the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable."

Rule 60 "is a remedial rule that 'should be liberally construed in order to do substantial justice.'" *United States v. Real Property & Residence Located at Rout 1, Box 111, Firetower Rd.*, 920 F.2d 788, 792 (11th Cir. 1991); *see also Hall v. Commissioner*, 805 F.2d 1511, 1515 (11th Cir. 1986) ("Rule 60(b) illustrates the purpose of the Federal Rules to dispense justice.").

AIG Baker devotes its opposition brief to an indiscriminate tear that Rule 60 does not apply to the confirmation of arbitration awards and particularly not to the confirmation of this arbitration award. Specifically, AIG Baker argues that (1) Rule 60(b) does not apply to arbitration awards and cannot be used "to modify the arbitration award itself;" (2) Rule 60(b) cannot "override the narrow scope of review . . . under the FAA;" (3) Rule 60(b) cannot be used "to relitigate issues previously decided in the arbitration proceedings;" (4) Rule 60(b) cannot give AMC relief to which it was not entitled in the confirmation proceedings; (5) granting AMC's Rule 60(b) motion will circumvent the mandate of the Court of Appeals; (6) the "law of the case" precludes the court from re-opening the merits of the arbitration; and (7) AMC has presented no evidence that it has satisfied the judgment.

AIG Baker's first four arguments miss the mark entirely; AIG Baker fails to acknowledge the distinction between the arbitration award itself and this court's entry of judgment confirming the arbitration award. As the Court of Appeals recognized in this very case, "[a] judgment entered under the Federal Arbitration Act on an award has the force and effect of a judgment recovered in any other civil action, regardless whether the court enters an order 'confirming, modifying, or correcting the award.'" *AIG Baker*, 508 F.3d at 1002 (citing 9 U.S.C. § 13; *Parsons & Wittemore Ala. Mach. & Servs. Corp. v. Yeargin Constr. Co.*, 744 F.2d 1482, 1484 (11th Cir. 1984)).

Given the mandate of the Court of Appeals, this court would not dream of modifying the arbitration award on any ground outside the FAA. What AMC seeks, however, is not modification of the arbitration award, but a credit toward this court's final judgment confirming the arbitration award. In fact, "Rule 60(b) is an appropriate vehicle by which to challenge a judgment confirming an arbitration award." *Baltia Air Lines, Inc. v. Transaction Mgmt., Inc.*, 98 F.3d 640, 642 (D.C. Cir. 1996) (denying relief under Rule 60(b) because request was not timely); *see also Greenwich Ins. Co. v. Goff Group, Inc.*, 159 F. App'x 409, 411 (3d Cir. 2005) (stating that Rule 60(b) may provide "[r]elief from judgment [*sic*], such as confirmation order").

At least one district court has granted Rule 60(b) relief under circumstances similar to this case. In *Clarendon Nat'l Ins. Co. v. TIG Reinsurance Co.*, 183 F.R.D. 112 (S.D.N.Y. 1983), the district court was confronted with a Rule 60(b) motion based upon a $363,000[2] mistaken calculation submitted to the arbitrators regarding the amount of Clarendon's payments to TIG. The court had earlier refused to modify the arbitration award under the FAA and entered judgment on that portion of the award. *See Clarendon Nat'l Ins. Co. v. TIG Reinsurance Co.*, 990 F. Supp. 304, 310 (S.D.N.Y. 1998). The court remanded another part of the award to the arbitrators, who acknowledged the miscalculation on

---

[2] Although the parties disputed the correction, they agreed that, if the calculation was corrected, only $346,000 belonged to Clarendon.

remand despite the court's confirmation of that part. *See Clarendon*, 183 F.R.D. at 114.

When the award came back to the district court after remand, the court granted Clarendon's Rule 60(b) motion for relief from the court's earlier confirmation. *Clarendon,* 183 F.R.D. at 117. Noting that "a judgment confirming an award, once entered, has the same force and effect as judgment in a civil action and is 'subject to all provisions of law' relating to judgments . . . includ[ing] the provisions of Fed. R. Civ. P. 60(b)," the district court held that "substantial justice [would] be served" by amending its judgment to give Clarendon credit for the $346,000 plus prejudgment interest on that amount. *Id.* at 117-18. In so doing, the court distinguished between using Rule 60(b) to modify the arbitration award itself, which is forbidden, and invoking Rule 60(b) to modify the court's judgment confirming the arbitration award, which is permitted. *Id.* at 117.

AIG Baker cites one case that it argues stands for the proposition that Rule 60(b) cannot be used in a proceeding to confirm an arbitration award. As AIG Baker points out, the court of appeals, in *Washington-Baltimore Newspaper Guild, Local 35 v. Wash. Post Co.,* 442 F.2d 1234 (D.C. Cir. 1971), stated that "neither Rule 60(b) . . . nor . . . any other of the Federal Rules of Civil Procedure was ever designed to apply to proceedings in other than the United States District Courts." *Washington-Baltimore,* 442 F.2d at 1239. Again, AIG Baker ignores an important distinction in the holding in *Washington-Baltimore:* that the district court did

not err by refusing to apply Rule 60(b) to the final arbitration award itself, not the court's confirmation of the arbitration award. Specifically, the appellant had sought through Rule 60(b) a remand to the arbitrators. Thus, despite AIG Baker's characterization, that case is consistent with those holding that Rule 60(b) applies to confirmation orders, rather than arbitration awards themselves. *See, e.g., Fid. Fed. Bank v. Durga Ma Corp.*, 387 F.3d 1021, 1023 (9th Cir. 2004) (stating that Rule 60 applies to a judgment confirming an arbitration award because "[a] judgment confirming an arbitration award is treated similarly to any other federal judgment").

AIG Baker's arguments that the court is somehow "overriding" the FAA's review provisions, "re-opening" the arbitration, or allowing "re-litigation" of the underlying dispute are similarly misplaced. The arbitrators were asked to decide AMC's share of real estate taxes under its two leases with AIG Baker for the years 1998 through 2002 – *i.e.*, the amount of taxes for which AMC was responsible. (*See* doc. 1, Ex. A.). The arbitrators decided that AMC was responsible for $226,771.76 in real estate taxes for the first half of 2002. AMC's current motion does not request that the court alter the finding that AMC was responsible for that amount or otherwise modify the arbitration award. In fact, the court has confirmed the arbitration award in its entirety. What AMC now seeks is recognition that it has previously satisfied that portion of the judgment entered when the court

confirmed the arbitration award - - a judgment like any other civil judgment.

Granting AMC's request under Rule 60(b) does not implicate, in any way, the FAA's "exceedingly narrow" grounds for reviewing an arbitration award because the court is not reviewing the merits of the arbitration award. Likewise, contrary to AIG Baker's argument, AMC is not relitigating any part of the original dispute. The original dispute was the amount of taxes for which AMC was responsible; the court is not disturbing that finding. Like the case cited for AIG Baker's earlier argument, the cases AIG Baker cites in support of these arguments have absolutely no bearing on Rule 60(b) relief from a judgment confirming an arbitration award. *See, e.g*, *LaFarge Conseils et Etudes, S.A. v. Kaiser Cement & Gypsum Corp.*, 791 F.2d 1334, 1337 (9th Cir. 1986)(holding that a party cannot collaterally attack an arbitration award by untimely appealing a district court's refusal to set aside the award under Rule 60(b)); *Fleming v. NYU,* 865 F.2d 478, 484 (2d Cir. 1989) (stating that Rule 60(b) cannot be used to relitigate the merits where party sought vacation of summary judgment order).

AIG Baker next argues that the court cannot grant AMC any relief to which AMC would not have been entitled at trial. The case AIG Baker cites for this proposition, *Bear Valley Mut. Water Co. v. R. A. Riddell,* 493 F.2d 948 (9th Cir. 1974), is easily distinguishable. There, the Ninth Circuit Court of Appeals held that a taxpayer could not use Rule 60(b) to amend the judgment in his refund suit on

the basis of loss carryovers that he did not raise prior to his Rule 60(b) motion. *Bear Valley*, 493 F.2d at 950. The court of appeals based its decision not on any generally applicable rules, but upon the interplay of two specific Treasury Regulations, which together made the filing of an administrative claim a jurisdictional prerequisite to a suit for refund and prohibited the taxpayer from recovering in his suit for refund on any ground not raised in the administrative claim. *Id.* at 950-51.

AMC, on the other hand, cites two controlling cases that are much more similar to this one, in which Rule 60(b) was used to relieve judgment debtors from amounts already paid, even though evidence of payment should have been presented at trial. In the lawsuit that was the subject of *Ferrell v. Trailmobile, Inc.*, 223 F.2d 697 (5th Cir. 1955),[3] the defendant was sued for failure to timely make installment payments on a truck trailer. At trial, the defendant testified that he made all the payments, but the lien holder testified otherwise; judgment was entered against the defendant. After trial, the defendant obtained photocopies of money orders bearing the plaintiff's endorsement that had been used to make the payments. *Ferrell*, 223 F.2d at 698. The defendant moved for relief under Rule 60(b), but the district court denied the motion. The Court of Appeals reversed, stating:

---

[3] Decisions of the former Fifth Circuit issued prior to October 1, 1981 are binding precedent in the Eleventh Circuit. *See Bonner v. City of Prichard Ala.*, 661 F.2d 1206, 1207 (11th Cir. 1981) (*en banc*).

> If, in fact, practically conclusive evidence shows that the appellant had actually paid all eighteen installments for the purchase of the trailer, it is obvious that the judgment should be set aside to prevent manifest miscarriage of justice. In such a case, the ends of justice may require granting a new trial even though proper diligence was not used to secure such evidence for use at the trial.

Id.

Relying on *Ferrell,* the former Fifth Circuit Court of Appeals reached a similar conclusion in *Johnson Waste Materials v. Marshall*, 611 F.2d 593 (5th Cir. 1980). In that case, the U.S. Department of Labor sued several defendants for violations of the minimum wage act. More than one year after entry of judgment in favor of the U.S. Department of Labor, the defendants moved for relief under Rule 60(b) on the basis of cancelled payroll checks showing the actual amounts paid to employees. The district court denied the motion, reasoning that the checks were "not newly discovered but merely newly produced evidence." *John Waste*, 611 F.2d at 597. The Fifth Circuit once again reversed, reasoning that Rule 60(b)(5) does not expressly require, and the Court has not read into it, a requirement that evidence be "newly discovered" or that the movant exercised "due diligence." *Id.* at 599. Rather, the court concluded that equitable considerations

support Rule 60(b) relief involving prior payment of an obligation on which a judgment is based:

> [W]hen a party has conclusive evidence that he has paid a portion of the judgment . . ., the judgment beneficiary in fact receives everything to which he is entitled; he is simply denied recovery of a windfall. . . .
>
> Moreover, requiring due diligence when there is proof of payment works an undue hardship on the judgment debtor. He is forced to pay a second time an obligation he can prove he has already discharged, merely because he was negligent in securing the proof. Given that the usual purpose of a civil suit is to exact compensation, not to punish the one at fault, it would be manifestly unjust to compel Double compensation on the basis of negligence alone.

Id.

The same rationale unquestionably applies in this case. The $226,771.76 that AMC should have paid AIG Baker under the lease was to compensate AIG Baker for the real estate taxes on the Kansas property for the first half of 2002. Presumably, AIG Baker then would have paid that amount to the taxing authority. Yet, under instructions from the new owner of the property,

AMC paid those taxes directly to the taxing authority. AIG Baker never paid that amount and does not owe those taxes. Granting AMC relief from judgment in that amount will not deprive AIG Baker of any amount to which it is entitled. Rather, AIG Baker "will only be denied a windfall recovery," and manifest injustice will be averted. *See John Waste*, 611 F.2d at 600-01. Moreover, the result fulfills the parties' intent as observed by the arbitrators: "The intent of the parties . . . is to require Respondent AMC to pay its fair share of the real estate taxes applicable to its leased premises." (Arbitration Award, p.2) (doc. 1, Ex. B).

AIG Baker next makes two related arguments: (1) that Rule 60(b) relief would circumvent the mandate of the Court of Appeals; and (2) that the "law of the case" doctrine precludes relief under Rule 60(b). AIG Baker points out that "[a] trial court, upon receiving the mandate of an appellate court, may not alter, amend, or examine the mandate, or give any further relief or review, but must enter an order in strict compliance with the mandate." Pl.'s Br. 9 (quoting *Friedman v. Market Street Mortg. Corp.*, 520 F.3d 1289, 1294 (11th Cir. 2008)). "Similar to the mandate rule," AIG Baker later continues, "the 'law of the case' doctrine precludes reconsideration of 'findings of fact and conclusions of law made by the court of appeals.'" Pl.'s Br. 10 (quoting *Baker v. Int'l Bhd. of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers, & Helpers, Dist. Lodge #57*, 841 F.2d 1067, 1072 (11th Cir. 1998)). These two arguments are merely two sides of the same coin. *See*

Transamerica Leasing, Inc. v. Inst. of London Underwriters, 430 F.3d 1326, 1333 (11th Cir. 2005) (noting that "[t]he mandate rule is nothing more than a specific application of the 'law of the case' doctrine") (internal quotation marks and citation omitted).

The court first notes, once again, that it has completely fulfilled the mandate of the Court of Appeals. This court, on May 1, 2008, confirmed the arbitration award in its entirety and entered judgment in favor of AIG Baker, thus satisfying the mandate. AMC's request, pursuant to Rule 60(b)(5) for relief from this court's judgment, not from the arbitration award – an important distinction, as discussed above – transgresses the mandate in no way.

The "law of the case" does not prohibit this court from entertaining AMC's Rule 60 motion because this Circuit's "case law could not be clearer that the law of the case doctrine cannot apply when the issue in question was outside the scope of the prior appeal." *Transamerica Leasing*, 430 F.3d at 1332; *see also Gulf Coast Bldg. & Supply Co. v. Int'l Bhd. Of Elec. Workers*, 460 F.2d 105, 107 (5th Cir. 1972) (stating that "on remand the trial court is free to pass upon any issue which was not expressly or impliedly disposed of on appeal"). The Court of Appeals did not address this court's power to grant relief from its own judgment, and, in fact, expressly noted that a judgment confirming an arbitration award "has the force and effect of a judgment

recovered in any other civil action." *AIG Baker*, 508 F.3d at 1002 (citations omitted).

Finally, AIG Baker argues that AMC has not established that it has satisfied the judgment. AIG Baker has not denied that AMC paid the 2002 taxes directly to the taxing authority, but focuses on the fact that AMC has not paid the amount to AIG Baker. AIG Baker points out that (1) the arbitration award provided that "AMC owes to [AIG Baker]" the amount of taxes, and (2) this court's order confirming the arbitration award entered judgment in favor of AIG Baker. Because neither the arbitration award nor this court's judgment expressly allowed AMC to make payments to another entity, AIG Baker argues that AMC is not entitled to relief under Rule 60. That AMC paid the taxing authority, AIG Baker concludes, "goes directly to the underlying contractual dispute that was subsumed by the arbitration award." (Pl.'s Br. 11).

Granting AMC relief pursuant to Rule 60, however, does not require this court to examine the underlying contractual dispute. The arbitrators resolved the contractual dispute by deciding that AMC was responsible under its leases with AIG Baker for a certain amount of real estate taxes. This court has confirmed that arbitration award and entered judgment for the amount of real estate taxes for which the arbitrators determined AMC was responsible. AMC has presented unrefuted evidence that it previously paid a portion of those real estate taxes. Specifically, AMC attached to its

answer (doc. 5) copies of checks payable to the taxing authority, and later submitted affidavits (doc. 26) that established that AIG Baker did not pay any portion of the 2002 real estate taxes on the property at issue and that AMC paid those taxes directly to the taxing authority. Acknowledging the source of AMC's liability under the arbitration award and this court's confirmation order – the real estate taxes – is not a re-examination of the underlying dispute. AIG Baker's focus upon to whom AMC paid the taxes for which it was responsible is misplaced. *See, e.g., Sunderland v. City of Philadelphia Gas Works,* 575 F.2d 1089, 1090 (3d Cir. 1978) (finding that defendant's payment to plaintiff's insurance company partially satisfied judgment in favor of plaintiff).

AMC has shown that it paid a portion of the taxes that constitute the judgment this court entered against AMC when it confirmed the arbitrators' decision regarding the amount of AMC's tax liability. This situation seems to be precisely one that Rule 60 was designed to remedy. AIG Baker, despite a barrage of arguments, has not persuaded this court otherwise. In sum, "to flog a horse, that if not dead, is at this point in mortal danger of expiring,"[4] Fed. R. Civ. P. 60(b) is properly applied to this court's judgment confirming the arbitration award to grant AMC relief for the amount of taxes it paid directly to the

---

[4] Professor Goldthwait Higginson Dorr III, Ph.D (portrayed by actor Tom Hanks), in the Coen brothers' 2004 remake of the 1955 British classic comedy *The Ladykillers.*

taxing authority. This result recognizes that AMC has satisfied a portion of this court's judgment confirming the arbitration award and avoids the miscarriage of justice that would result from AIG Baker's knowing receipt of a quarter-of-a-million dollar windfall.

B. AIG Baker's Motion to Amend

In its final order, the court entered judgment "in favor of AIG Baker Sterling Heights, LLC" and dismissed the case with prejudice. In a footnote, the court noted that it "did not decide AMC's counterclaims for CAM fee offsets on the merits, *see* doc. 31; therefore, that part of the court's decision is without prejudice."

AIG Baker now seeks three modifications to that order. First, AIG Baker argues that the final order is "inconsistent" because it "purports to enter judgment in favor of AIG Baker . . . but then states that the case is 'DISMISSED WITH PREJUDICE.'" AIG Baker believes that its motion for confirmation cannot be both confirmed and dismissed. Yet, whether the court expressly states so or not, this is exactly what happens in every case: when the court resolves all issues in the case, it enters judgment on all claims and dismisses the action because nothing remains to be done by this court.

On the other hand, the court need not <u>expressly</u> state that a case is dismissed when it resolves all disputes. This case has a particularly torrid history of AIG Baker vehemently seeking

what essentially amounts to a windfall. Perhaps the court considered the "dismissed with prejudice" language a necessity lest AIG Baker bring an action to confirm the arbitration award a second time. Nevertheless, AIG Baker's objection to the language used in the final order boils down to semantics; thus, this court is willing to omit the language so as to appease AIG Baker.

AIG Baker's next argument is that "the court's order may not be final" because "the court indicates [in footnote 1] that it has not decided [AMC]'s counterclaims, and excludes the counterclaims from the [final order]." AIG Baker suggests that the court modify the final order to reflect that AMC's claims were previously dismissed without prejudice. This argument, like AIG Baker's first, is simply AIG Baker's disagreement with the manner in which the court constructed its sentence; AIG Baker would have the court draft a simple, rather than compound, sentence. The court did not "exclude" AMC's counterclaims from the final order, but simply noted that, because the court dismissed those claims without reaching the merits, those claims were dismissed without prejudice: "the court did not decide AMC's counterclaims . . . on the merits . . .; therefore, that part of the court's decision is without prejudice." Because others, like Plaintiff's counsel, may not connect the independent clause that follows the semicolon with the statement that precedes it, the court will rephrase as a single, unambiguous sentence.

Finally, AIG Baker points out that the court's final order entered judgment only in favor of AIG Baker Sterling Heights, L.L.C., neglecting also to enter judgment in favor of the other Plaintiff, A.B. Olathe II Limited Partnership. This omission was most assuredly unintentional, and the court will amend the final order to enter judgment in favor of both Plaintiffs.

III. CONCLUSION

For the reasons stated above, the court concludes that AMC's motion for partial relief from judgment under Fed. R. Civ. P. 60(b)(5) and AIG Baker's motion to modify the final order are due to be GRANTED. The court will enter a separate revised final order consistent with this memorandum opinion.

DATED this 17th day of July, 2008.

s/ Karon O. Bowdre
KARON OWEN BOWDRE
UNITED STATES DISTRICT JUDGE

AIG BAKER STERLING HEIGHTS, LLC, A.B. Olathe II Limited Partnership, Plaintiffs-Counter-Defendants-Appellants,

v.

AMERICAN MULTI-CINEMA, INC., Defendant-Counter-Claimant-Appellee.

American Multi-Cinema, Inc., Plaintiff-Appellee,

v.

AIG Baker Sterling Heights, LLC, A.B. Olathe II Limited Partnership, Defendants-Appellants.

No. 07-10130.

United States Court of Appeals, Eleventh Circuit.

Nov. 28, 2007.

Background: Following arbitration of dispute between landlord and shopping center tenant concerning tenant's liability for real-estate taxes assessed by Kansas county on the leased property, landlord filed action seeking confirmation of arbitration award as well as prejudgment interest. Tenant brought separate action, and the two actions were consolidated. The United States District Court for the Northern District of Alabama, Nos. 03-01930-CV-BE-S and 03-02901-CV-BE, Karon O. Bowdre, J., denied landlord's confirmation request, granted tenant's motion for modification on the basis of an "evident material mistake," and declined to award interest. Landlord appealed.

Holdings: The Court of Appeals, Pryor, Circuit Judge, held that:

(1) the failure of the stipulated facts to reflect that tenant had paid $248,624.57 to the county was not an "evident material mistake" within meaning of the Federal Arbitration Act (FAA) and, thus, the district court lacked authority to modify the arbitration award on the basis of a mistake;

(2) addressing an issue of apparent first impression for the court, state law, not federal law, governs the availability and amount of prejudgment interest in diversity cases involving the FAA; and

(3) the availability and amount of prejudgment interest does not depend on whether the district court confirms or modifies an arbitration award.

Reversed and remanded.

Appeal from the United States District Court for the Northern District of Alabama.

Before MARCUS and PRYOR, Circuit Judges, and LAND,[1] District Judge.

PRYOR, Circuit Judge:

This appeal in an action to confirm an arbitration award presents two main questions, including one that has divided our sister circuits

---

[1] Honorable Clay D. Land, United States District Judge for the Middle District of Georgia, sitting by designation.

about the interpretation of the Federal Arbitration Act: (1) whether section 11(a) of the Act, which allows a district court to correct an "evident material mistake in the description of any person, thing, or property referred to in the award," embraces a mistake by a party that was not brought to the attention of the arbitration panel before the panel rendered the award; and (2) whether state or federal law governs the availability and amount of prejudgment interest in an action to confirm an arbitration award when jurisdiction is based on diversity of citizenship. AIG Baker Sterling Heights, L.L.C., and A.B. Olathe II (collectively "Baker") agreed with American Multi-Cinema, Inc., ("American") to arbitrate a dispute concerning the liability for real-estate taxes that a Kansas county assessed on property that American leased from Baker. During the arbitration, American estimated that its share of taxes for the year 2002 was $226,771.76. American contends that it erroneously admitted that it had paid nothing to Baker that year and the arbitration award to Baker included the $226,771.76. American asserts that it later discovered that it had paid the tax assessor $248,624.57, its share of taxes for 2002. The district court modified the award by deducting the $248,624.57 and declined, under federal law, to grant Baker prejudgment interest. Because we conclude that the district court exceeded its authority under section 11(a) and the availability and amount of prejudgment interest is a question of state law, we reverse and remand for further proceedings.

I. BACKGROUND

American leased from Baker space in two shopping centers, respectively located in Michigan and Kansas. The lease agreement required American to pay Baker a portion of the real-estate taxes on the properties. A dispute arose over the amount of tax that American owed Baker. The parties agreed to submit the dispute to a three-member arbitration panel in Kansas City, Missouri. The panel awarded $866,425.18 to Baker.

Baker filed an action in the Northern District of Alabama for confirmation of the award and sought prejudgment interest. American filed an answer and counterclaim in the district court, and American filed a separate action in the Western District of Missouri to modify the award. The district court in Missouri transferred its action to the Northern District of Alabama, and the two actions were consolidated. American also filed a motion to correct the award with the arbitration panel, but the panel concluded that the motion by American was untimely.

A portion of the award, $226,771.76, corresponds to the liability of American to Baker for taxes on the Kansas property in 2002. Ownership of the property changed in the middle of 2002, and the landlord that replaced Baker asked American to pay the share of taxes that American owed for the first half of the year directly to the county tax authority. American did so, but "now realizes that this payment was a mistake." American contends that it

should have made this payment to Baker, which should have paid the county. American argues that it is entitled to a credit for the amount of tax it paid on the Kansas property for the 2002 tax year.

American did not present any of this information to the arbitration panel before the panel rendered its award. American admitted to the panel that its unpaid tax liability for 2002 on the Kansas property was approximately $226,771. The facts admitted to the arbitration panel did not reflect the payment by American to the county because American "did not realize its mistake until it was preparing to pay the arbitration award."

The district court denied the request that Baker made for confirmation of the award and granted the motion by American for modification on the basis of an "evident material mistake." The court reduced the balance of the award by $248,624.57-the amount that American paid to the county. The court exercised "discretion *not* to award interest," and the court found that American had already paid $593,375.75 of the remaining amount owed to Baker. The court entered judgment in favor of Baker in the amount of $78,424.86. On appeal, Baker argues that the district court erred when it modified the award, declined to award prejudgment interest, and found that Baker had already paid part of the amount of the award.

II. STANDARD OF REVIEW

We review *de novo* questions of law that concern the modification of an arbitration award, *Offshore Marine Towing, Inc. v. MR23*, 412 F.3d 1254, 1255 (11th Cir.2005), and choice of law questions, *Federated Rural Elec. Ins. Exch. v. R.D. Moody & Assocs., Inc.*, 468 F.3d 1322, 1325 (11th Cir.2006). We review for clear error findings of fact by a district court. *Gaskin v. Sec'y, Dep't of Corr.*, 494 F.3d 997, 1001 (11th Cir.2007).

III. DISCUSSION

Baker makes three arguments on appeal. First, Baker argues that the district court exceeded its authority to modify an arbitration award under the Federal Arbitration Act, 9 U.S.C. §§ 1-16. Second, Baker argues that the district court should have followed state, not federal, law to determine whether Baker was entitled to prejudgment interest and the amount of interest. Third, Baker argues that the district court erred when it found that American paid a portion of the judgment. We address each argument in turn.

A. The District Court Did Not Have Authority To Modify the Arbitration Award on the Basis of a Mistake.

"The Federal Arbitration Act presumes that arbitration awards will be confirmed, and judicial review of an arbitration award is narrowly limited," *Rosensweig v. Morgan Stanley & Co.*, 494 F.3d 1328,

1333 (11th Cir.2007) (citing *B.L. Harbert Int'l, LLC v. Hercules Steel Co.*, 441 F.3d 905, 909 (11th Cir.2006)), but a district court may modify or correct an arbitration award "[w]here there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award," 9 U.S.C. § 11(a). The district court relied on this authority to modify the award that Baker received. The court ruled that the failure of the stipulated facts to reflect that American had paid $248,624.57 to the county was an "evident material mistake." We disagree.

The "starting point for interpreting a statute is the language of the statute itself." *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108, 100 S.Ct. 2051, 2056, 64 L.Ed.2d 766 (1980). American concedes that the arbitration award did not contain a "miscalculation of figures," so we address only the part of the Federal Arbitration Act that permits a district court to correct an "evident material mistake in the description of any person, thing, or property referred to in the award." 9 U.S.C. § 11(a). The authority of the district court to modify the award turned on the meaning of this text.

The plain language of the statute embraces only an "evident material mistake" that appears in a description "in the award." Because the arbitration panel crafts the award, only the panel can make a mistake in the award. To make a "mistake" is to "understand wrongly" or to "recognize or identify

incorrectly." *Webster's II New Riverside University Dictionary* 759 (1984). What American complains about is not a "mistake," but rather "ignorance"-a "lack of knowledge." *Id.* at 608.

The arbitration panel did not "understand wrongly." The panel lacked knowledge because American never provided the panel with information about the tax payment to the county. The arbitration award that Baker received may be a product of ignorance attributable to an oversight by American, but the award does not contain an "evident material mistake in the description of any person, thing, or property referred to in the award." 9 U.S.C. § 11(a).

Ordinarily our interpretation of the text of section 11(a) would be the end of the matter, *United States v. Fisher*, 6 U.S. (2 Cranch) 358, 399, 2 L.Ed. 304 (1805) ("Where a law is plain and unambiguous ... no room is left for construction."), but there is an odd wrinkle in this appeal. A sister circuit has construed what we consider to be the plain and unambiguous text of section 11(a) to mean something different from our interpretation. American relies heavily on that decision to support its reading of section 11(a).

The Fourth Circuit has interpreted section 11(a) to embrace mistakes that were made by parties that were never brought to the attention of the arbitration panel, *see Transnitro, Inc. v. M/V Wave*, 943 F.2d 471, 474 (4th Cir.1991); *see also Eljer Mfg., Inc. v. Kowin Dev. Corp.*, 14 F.3d 1250,

1254 (7th Cir.1994) (citing with approval *Transnitro*), but a more recent decision of that circuit reads section 11(a) in the same manner that we do. In *Apex Plumbing Supply, Inc. v. U.S. Supply Co.*, the Fourth Circuit held that a mistake "was not 'evident' because it did not appear on the face of the arbitration award." 142 F.3d 188, 194 (4th Cir.1998). We are convinced that the earlier decision of the Fourth Circuit in *Transnitro* is erroneous.

Even if we were to assume that the plain language of section 11(a) is ambiguous, which would mean that it is reasonably susceptible to another interpretation, we would reach the same conclusion. We would be guided by the established meaning that the words of section 11(a) had at the time they were adopted. "[I]f a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it." *Evans v. United States,* 504 U.S. 255, 260 n. 3, 112 S.Ct. 1881, 1885 n. 3, 119 L.Ed.2d 57 (1992) (quoting Felix Frankfurter, *Some Reflections on the Reading of Statutes,* 47 Colum. L.Rev. 527, 537 (1947)) (internal quotation marks omitted). Stated differently, "[w]hen Congress uses language with a well-known legal meaning," we generally presume "the statute to incorporate that understood meaning." *Assa'ad v. U.S. Att'y Gen.*, 332 F.3d 1321, 1329 (11th Cir.2003).

The language of the Federal Arbitration Act, which was enacted in 1925, was transplanted from the Arbitration Law that the State of New York enacted in 1920, Arbitration Law, ch. 275, 1920 N.Y.

Laws 803 (codified as amended at N.Y. C.P.L.R. §§ 7501-7514); *see also* J.P. Chamberlain, *Current Legislation: The Commercial Arbitration Law,* 9 A.B.A. J. 523, 524 (1923); Larry J. Pittman, *The Federal Arbitration Act: The Supreme Court's Erroneous Statutory Interpretation, Stare Decisis, and a Proposal for Change,* 53 Ala. L.Rev. 789, 797 (2002); Michael R. Holden, Note, *Arbitration of State-Law Claims by Employees: an Argument for Containing Federal Arbitration Law,* 80 Cornell L.Rev. 1695, 1705 & n. 48 (1995), and the settled meaning of that earlier law is consistent with our interpretation. The language of section 11(a) of the federal Act matched almost verbatim the language of section 2375 of the New York Code of Civil Procedure, which had long been a part of New York law and the New York Arbitration Law incorporated by reference. *See* N.Y.Code Civ. P. § 2375 (Matthew Bender 1916) (codified as amended at N.Y. C.P.L.R. § 7511(c)) (requiring a court to modify or correct an arbitration award "[w]here there was an evident miscalculation of figures, or an evident mistake in the description of any person, thing, or property, referred to in the award"); Arbitration Law § 8, 1920 N.Y. Laws at 806. By 1920, when New York passed its Arbitration Law, the New York Court of Appeals had recognized that, to fall within the scope of section 2375, a mistake or miscalculation must have appeared in the award "on its face." *In re Burke,* 191 N.Y. 437, 440, 84 N.E. 405, 406 (1908). This principle, which has been part of New York jurisprudence for many years, *see, e.g., Matter of Tamaron Invs., Inc.,* 167 Misc.2d 125, 637 N.Y.S.2d 637, 638 (N.Y. Sup. Ct. 1996); *Moore v. Eadie,* 245

N.Y. 166, 171, 156 N.E. 653, 655 (1927) (citing *Burke,* 191 N.Y. at 437, 84 N.E. at 405);*Sweet v. Morrison,* 116 N.Y. 19, 33, 22 N.E. 276, 280 (1889); *Bissell v. Morgan,* 56 Barb. 369 (N.Y. Gen. Term 1865), was part of the "old soil" that accompanied the language that was transplanted from New York law into section 11(a) of the Federal Arbitration Act in 1925. Section 11(a), which has not changed materially since it was first enacted, continues to embrace this principle.

Our reading of section 11(a) is also consistent with the purpose of the Federal Arbitration Act: "to relieve congestion in the courts and to provide parties with an alternative method for dispute resolution that is speedier and less costly than litigation." *Caley v. Gulfstream Aerospace Corp.,* 428 F.3d 1359, 1367 (11th Cir.2005) (internal quotation marks omitted). Because arbitration is an alternative to litigation, judicial review of arbitration decisions is "among the narrowest known to the law." *Del Casal v. E. Airlines, Inc.,* 634 F.2d 295, 298 (5th Cir. Unit B Jan.1981). That narrow review is why a court cannot vacate an arbitration award for fraud based on information available before or during the arbitration that the parties, through lack of diligence, failed to discover. *Bonar v. Dean Witter Reynolds, Inc.,* 835 F.2d 1378, 1383 (11th Cir.1988).

This appeal illustrates the danger of broad judicial review of arbitration awards. The parties elected to settle their dispute by arbitration rather than litigation, but this appeal is now before us after

more than three years of litigation. The district court erred when it modified the award.

B. State Law Governs the Availability and Amount of Prejudgment Interest.

The discussion by the district court of its decision not to grant prejudgment interest is brief and not entirely clear. We believe that the rationale for the decision of the district court can be read two ways. Either the district court determined that it had discretion to decline to grant prejudgment interest under federal law, *see Indus. Risk Insurers v. M.A.N. Gutehoffnungshutte GmbH,* 141 F.3d 1434, 1447 (11th Cir.1998) (under federal law, prejudgment interest is a matter of the discretion of the district court), or it determined that prejudgment interest is unavailable because the award was modified rather than confirmed. Under either reading, the district court erred. We address each of these readings in turn.

The district court erred to the extent that it exercised discretion under federal law to decline to award prejudgment interest because state law governs the entitlement of Baker to prejudgment interest. The jurisdiction of the district court was based on diversity of citizenship. In diversity cases, the availability and amount of prejudgment interest is ordinarily governed by state law. *See Venn v. St. Paul Fire & Marine Ins. Co.,* 99 F.3d 1058, 1066-67 (11th Cir.1996).

An exception to this general rule exists when

"affirmative 'countervailing federal interests' are at stake that warrant application of federal law," *Esfeld v. Costa Crociere, S.P.A.*, 289 F.3d 1300, 1307 (11th Cir.2002) (quoting *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 432, 116 S.Ct. 2211, 2222, 135 L.Ed.2d 659 (1996)), but the Federal Arbitration Act does not place countervailing federal interests at stake in this appeal. As the Supreme Court has explained, the Act "is something of an anomaly in the field of federal-court jurisdiction. It creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate, yet it does not create an independent federal-question jurisdiction under 28 U.S.C. § 1331 or otherwise." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25 n. 32, 103 S.Ct. 927, 942 n. 32, 74 L.Ed.2d 765 (1983). The Act places arbitration agreements on the same footing under state law as other agreements. *Perry v. Thomas*, 482 U.S. 483, 492 n. 9, 107 S.Ct. 2520, 2527 n. 9, 96 L.Ed.2d 426 (1987). The Act serves federal interests adequately when state law answers questions concerning the availability and amount of prejudgment interest. Those are questions about which the Act is silent.

American argues that federal law governs the availability and amount of prejudgment interest whenever federal law provides a rule of decision. We disagree. The decision upon which American relies for this argument, *Kilpatrick Marine Piling v. Fireman's Fund Insurance Co.*, is an admiralty case in which our jurisdiction was based on diversity. 795 F.2d 940, 947-48 (11th Cir.1986). *Kilpatrick* held

"that admiralty courts have discretion in deciding prejudgment interest," *id.*, but admiralty law is a context in which a countervailing federal interest-"the federal interest in uniformity"-sometimes requires a choice of federal common law rather than state law, *Mink v. Genmar Indus., Inc.*, 29 F.3d 1543, 1548 (11th Cir.1994).

In the absence of a federal interest that requires the application of federal law, the existence of a federal rule of decision in a diversity case does not affect the question whether the availability and amount of prejudgment interest is governed by state or federal law. We join our sister circuits that have addressed this question and hold that state law governs the availability and amount of prejudgment interest in diversity cases involving the Federal Arbitration Act. *See Executone Info. Sys., Inc. v. Davis*, 26 F.3d 1314, 1329 (5th Cir.1994); *Northrop Corp. v. Triad Int'l Mktg., S.A.*, 842 F.2d 1154, 1155 (9th Cir.1988). The district court erred to the extent that it applied federal law to determine whether Baker was entitled to prejudgment interest.

The district court also erred to the extent that it held that prejudgment interest is unavailable because the arbitration award was modified rather than confirmed. The availability and amount of prejudgment interest does not depend on whether the district court confirms or modifies the award. A judgment entered under the Federal Arbitration Act on an award has the force and effect of a judgment recovered in any other civil action, regardless whether the court enters an order "confirming,

modifying, or correcting the award." 9 U.S.C. § 13; *see also Parsons & Whittemore Ala. Mach. & Servs. Corp. v. Yeargin Constr. Co.*, 744 F.2d 1482, 1484 (11th Cir.1984). As in any other civil action based on diversity of citizenship, the district court must look to state law to determine the availability and amount of prejudgment interest when it enters a judgment, regardless of whether that judgment confirms or modifies an award under the Federal Arbitration Act. The district court erred to the extent that it held otherwise.

Our decision that state law governs the availability and amount of prejudgment interest is not the end of the matter. On remand, the district court must determine under the choice-of-law rules of Alabama, *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496, 61 S.Ct. 1020, 1021, 85 L.Ed. 1477 (1941), which state law governs the availability and amount of interest. Baker argues that Missouri law applies and entitles Baker to prejudgment interest "at the rate of nine percent per annum." Mo. Ann. Stat. § 408.020. American argues for the application of Alabama law, which provides for prejudgment interest at a lower rate of six percent. Ala.Code § 8-8-1. The district court should resolve that issue in the first instance.

C. The Payment by American to Baker.

Baker has argued that the district court erred when it found that "Defendant AMC has already paid $539,375.75" of the arbitration award and reduced the balance due to Baker by that amount.

American explains that the district court directed counsel for American to bring a check for this amount, which represents the amount of the award that was not in dispute, to a status conference that the court held. American contends that it complied and presented the check to counsel for Baker in the presence of the district court.

Baker does not dispute that it received the payment from American. In its brief, Baker argued that the district court erred because no evidence of the payment appears "in the record," even though statements by counsel for Baker recorded in a later hearing, a transcribed colloquy between the court and counsel for American, and the order of the district court all reflect the payment. Baker wisely abandoned this position at oral argument, so we need not address this issue further.

IV. CONCLUSION

The order of the district court modifying the arbitration award and declining to award prejudgment interest is REVERSED. We REMAND to the district court for further proceedings consistent with this opinion.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
ALABAMA SOUTHERN DIVISION

FILED 2006 Dec-07 PM 04:37 U.S. DISTRICT
COURT N.D. OF ALABAMA

AIG BAKER STERLING HEIGHTS, LLC, A.B. OLATHE II LIMITED PARTNERSHIP, Plaintiffs,	)	CONSOLIDATED LEAD CASE: CV-03-BE-1930-S
v.	)	
AMERICAN MULTI-CINEMA, INC. Defendant.	)	MEMBER CASE: CV-03-BE-2901-S

ORDER

This case is before the court on Plaintiff's Motion for Confirmation and Entry of Judgment on Arbitrators' Award (Doc. 1); Defendant's Application for Modification and Correction of Arbitrators' Award; and Plaintiff's Motion to Strike Defendant's Answer and Dismiss Defendant's Counterclaim (Doc. 9). The court held a hearing on these motions on Tuesday, November 14, 2006. For the reasons explicitly stated on the record, the court hereby DENIES Plaintiff's Motion for Confirmation and GRANTS Defendant's Application for Modification. The court also DENIES in part and GRANTS in part Plaintiff's Motion to Strike, without prejudice to

AMC to file a claim for CAM fees in an appropriate action should it decide to do so.

This case arises out of an award issued in an arbitration proceeding between Plaintiff AIG Baker Sterling Heights, LLC ("AIG") and Defendant American Multi-Cinema, Inc. ("AMC") relating to AMC's liability to AIG for real estate taxes on two properties owned by AIG and leased to AMC. Following the conclusion of arbitration, AIG moved in this court for confirmation of the arbitration award and AMC applied in another district court for an order modifying the award.[17]

I. Plaintiff's Motion to Strike Defendant's Answer and Dismiss Defendant's Counterclaim

In light of the court's ruling on Plaintiff's Motion for Confirmation, discussed in detail below, the court deems MOOT Plaintiff's Motion to Strike AMC's Answer. Plaintiff has also moved to dismiss AMC's counterclaim seeking an offset to the arbitration award for Common Area Maintenance ("CAM") fees. AMC's counterclaim is for $83,193, which AMC claims AIG owes based upon two lease-related agreements that preceded the parties' agreement to arbitrate the dispute regarding the

---

[17] Defendant initially made its application in an action it filed in the Western District of Missouri and that was subsequently transferred to this court and consolidated with the lead case.

real estate taxes. AMC did not raise the CAM fee offset as a claim in the arbitration proceeding or in its Missouri action, which only included an Application for Modification. For the following reasons, the court GRANTS the motion to dismiss the counterclaims.

The Eleventh Circuit Court of Appeals expressly held:

> To allow a respondent to assert counterclaims that are beyond the scope of the defenses enumerated in the [Federal Arbitration] Act would change the nature of the confirmation proceedings and would defeat the purpose of the Act. [Respondent] does not argue that its counterclaims are within the scope of those defenses allowed by §§ 10 and 11 of the Act. The district court, therefore, correctly struck [the respondent's] counterclaims.

Booth v. Hune, 902 F.2d 925, 933 (11th Cir. 1990). In its counterclaims, AMC has not argued that the arbitration award should be vacated under § 10 because of some corruption, misconduct, or abuse of power by the arbitrators. Nor has AMC presented the counterclaim for CAM fee offsets as necessary because of the § 11 defenses of an evident material miscalculation, evident material mistake, or an imperfection in the form of the arbitration award.

At best, AMC has established only that the parties excluded the issue of the CAM fees from arbitration because they both agreed that AIG owed AMC the CAM fees, whereas the amount of real estate taxes owed was in dispute. The agreement to arbitrate, as well as the prior lease-related agreements, clearly evince the parties' intention to submit to arbitration *only* the disputed issue regarding real estate taxes. The agreement to arbitrate poses the following questions: "(I) What is the amount [of the real estate taxes applicable to both leased premises] properly payable by AMC . . . ? (ii) What is the amount thereof previously paid by AMC . . . ? and; (iii) What is the amount thereof presently owing by AMC . . . or . . . to AMC?" The questions presented in the arbitration agreement make reference *only* to the real estate taxes. Therefore, the court finds that the purpose of the arbitration was limited to the single issue of real estate taxes - not to the total sum the parties owed to each other.

AMC's counterclaim for CAM fee offsets falls well outside the scope of the subject of the arbitration award and the defenses delineated in §§ 10 or 11 of the FAA. Therefore, the court GRANTS Plaintiff's Motion to Strike as to Defendant's counterclaims for the CAM fee offsets. This decision, however, should not be viewed as a decision on the merits of AMC's claim for CAM fees from AIG, nor as any preclusion of a properly presented claim.

II. Plaintiff's Motion for Confirmation and Defendant's Application for Modification

During the arbitration hearing between AIG and AMC, the parties provided the arbitrators with a list of stipulated facts. The stipulated facts stated, in part, that AMC's potential tax liability on the Olathe property for the period January 1, 2002 through June 28, 2002 was around $226,771. The stipulation further provided that AMC had made "$0.00" payments for that period. On June 18, 2003, based in part on stipulated facts regarding AMC's tax liability on the properties owned by AIG and leased to AMC, the arbitrators issued an award totaling $866,425.18.

Following the arbitrators' decision, AMC discovered that the stipulation of facts did not reflect the taxes AMC actually paid on the Olathe property. In fact, AMC paid $248,624.57 in real estate taxes directly to the Olathe property taxing authority for the first half of 2002 instead of the "$0.00" payments as stated in the stipulation. AMC contends that the failure of the stipulated facts to reflect this amount constitutes a material mistake and this court should modify the arbitration award, as authorized by 9 U.S.C. § 11. As explicitly stated on the record, the court finds that the error in the stipulated facts constitutes an evident material mistake justifying modification of the award. To hold otherwise would require AMC to pay twice for the same property taxes. The court finds that modification of the award based on the material mistake therein best

"promote[s] justice between the parties" as this court is permitted to do by 9 U.S.C. § 11.

Therefore, the court GRANTS Defendant's Application for Modification and hereby ORDERS that the amount of the arbitrators' award be reduced by the $248,624.57 actually paid by AMC in 2002. Having determined that modification of the award is appropriate, the court DENIES Plaintiff's Petition for Confirmation and Entry of Judgment.

III. Prejudgment Interest

As discussed at the hearing, AIG has requested that the court award interest on the arbitration award beginning at the time it was entered. In support of its request, AIG cites *Lewis v. Haskell Co.*, 304 F. Supp. 1347 (M.D. Ala. 2004), where the court awarded state statutory interest on an arbitration award. Notably, the district court in *Lewis* had *confirmed* the arbitration award. Here, having decided to *modify* the arbitration award, the court has ruled against AIG's motion to confirm. Accordingly, AIG's request for interest, which is ancillary to its motion to confirm, is DENIED.[18]

---

[18] The court also notes that, according to a treatise on commercial arbitration:

> Where the arbitrator makes an award of postarbitration award interest, courts cannot modify the award absent statutory authority. If an arbitrator does not include a determination of interest in the award, courts have the discretion to add

In summary, the court DENIES Plaintiff AIG's Motion for Confirmation, GRANTS Defendant AMC's Application for Modification, GRANTS Plaintiff's Motion to Dismiss Defendant's counterclaim, and deems as MOOT Plaintiff's Motion to Strike Defendant's Answer. The arbitrators awarded Plaintiff AIG 866,425.18 and Defendant AMC has already paid $539,375.75 of that award, with a balance remaining of $327,049.43. The court hereby ORDERS that the balance of the award be reduced by $248,624.57, leaving $78,424.86 to be paid by AMC. Having resolved all disputes raised in this action, the court ORDERS that this case in its entirety is hereby DISMISSED with prejudice[29], costs taxed as paid.

DONE and ORDERED this 7th day of December, 2006.

s/ Karon O. Bowdre
KARON OWEN BOWDRE UNITED STATES DISTRICT JUDGE

---

postarbitration award interest and postjudgment interest on actions to confirm arbitration award.

1 *Domke on Com. Arb.* §35:6 (West 2006). Here, the arbitrators did not include post-award interest in their decision and this court exercises its discretion *not* to award interest.

[29] As noted previously, the court's decision to grant Plaintiff's Motion to Strike as to Defendant's counterclaims for the CAM fee offsets should not be viewed as a decision on the merits of AMC's claim for CAM fees from AIG, nor as any preclusion of a properly presented claim. Therefore, that portion of the court's order is without prejudice.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
ALABAMA SOUTHERN DIVISION

FILED 2008 APR.-15 AM 11:53 U.S. DISTRICT
COURT N.D. OF ALABAMA

AIG BAKER STERLING HEIGHTS, L.L.C., et al., Plaintiffs,	)	
v.	)	CV-03-BE-1930-S
AMERICAN MULTI-CINEMA, INC., Defendant.	)	

ORDER

The United States Supreme Court recently acknowledged that the Federal Arbitration Act's ("FAA") limited grounds for judicial review of an arbitration award do not "exclude more searching review based on authority outside the statute . . . [such as] under state statutory or common law, for example." *Hall Street Assocs. L.L.C., v. Mattel, Inc.*, 128 S. Ct. 1396, 1406 (2008). Accordingly, the court invites supplemental briefing on the existence of any non-FAA grounds for modifying the arbitration award, such as whether the arbitration award is "contrary to public policy." *See Brown v. Rauscher Pierce Refsnes, Inc.*, 994 F.2d 775, 779 (11th Cir. 1993), *citing Delta Air Lines, Inc. v. Airline Pilot*

Ass'n, 861 F.2d 665, 671 (11th Cir. 1988), *cert. denied*, 493 U.S. 871 (1989).

Any party wishing to address this issue may submit a brief on or before **April 25, 2008.**

DONE and ORDERED this 15th day of April, 2008.

s/ Karon O. Bowdre
KARON OWEN BOWDRE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 08-14600

AIG BAKER STERLING HEIGHTS, LLC,
A.B. OLATHE II LIMITED PARTNERSHIP,

Plaintiff-Counter-
Defendants – Appellants,

versus

AMERICAN MULTI-CINEMA, INC.,

DefendantCounter-
Claimant-Appellee.

On Appeal from the United States District Court
for the Northern District of Alabama

FILED U.S. COURT OF APPEALS ELEVENTH CIRCUIT OCT 22, 2009 THOMAS K. KAHN, CLERK

ON PETITION (S) FOR REHEARING AND
PETITION (S) FOR REHEARING EN BANC

Before: DUBINA, Chief Judge, EDMONDSON and KAVITCH, Circuit Judges.
PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

s/ J.L. Edmondson
UNITED STATES CIRCUIT JUDGE

PERTINANT PROVISIONS OF THE FEDERAL ARBITRATION ACT
9 U.S.C. §§ 1, et seq.

9 USC § 9

§ 9. Award of arbitrators; confirmation; jurisdiction; procedure

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident, then the notice of the application shall be served by the marshal of any district within which the adverse

party may be found in like manner as other process of the court.

PERTINANT PROVISIONS OF THE FEDERAL ARBITRATION ACT 9 U.S.C. §§ 1, et seq.

9 USC § 10

§ 10. Same; vacation; grounds; rehearing

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration --

(1) where the award was procured by corruption, fraud, or undue means;

(2) where there was evident partiality or corruption in the arbitrators, or either of them;

(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(b) If an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators.

(c) The United States district court for the district wherein an award was made that was issued pursuant to section 580 of title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 573 of title 5.

PERTINANT PROVISIONS OF THE FEDERAL ARBITRATION ACT 9 U.S.C. §§ 1, et seq.

9 USC § 11

§ 11. Same; modification or correction; grounds; order

In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration--

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.

(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

PERTINANT PROVISIONS OF THE FEDERAL ARBITRATION ACT 9 U.S.C. §§ 1, et seq.

9 USC § 13

§ 13. Papers filed with order on motions; judgment; docketing; force and effect; enforcement

The party moving for an order confirming, modifying, or correcting an award shall, at the time such order is filed with the clerk for the entry of judgment thereon, also file the following papers with the clerk:

(a) The agreement; the selection or appointment, if any, of an additional arbitrator or umpire; and each written extension of the time, if any, within which to make the award.

(b) The award.

(c) Each notice, affidavit, or other paper used upon an application to confirm, modify, or correct the award, and a copy of each order of the court upon such an application.

The judgment shall be docketed as if it was rendered in an action.

The judgment so entered shall have the same force and effect, in all respects, as, and be subject to all the provisions of law relating to, a judgment in an action; and it may be enforced as if it had been

rendered in an action in the court in which it is entered.

PERTINANT PROVISIONS OF RULE 60 OF THE FEDERAL RULES OF CIVIL PROCEDURE

Rule 60(b)

(b) Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);

(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;

(4) the judgment is void;

(5) the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or

(6) any other reason that justifies relief.